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STATE OF NEW YORK

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ANNUAL REPORT

OF THE

ATTORNEY—GENERAL

For the Year Ending December 31, 1921

CHARLES D. NEWTON
ATTORNEY—GENERAL



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STATE OF NEW YORK
OFFICE OF THE ATTORNEY-GENERAL
ALBANY

To the Legislature of the State of New York:

In conformity with the requirements of section 66 of the Executive Law, I have the honor to submit herewith the annual report of the Attorney-General for the year ending December 31, 1921.

Dated January 1, 1922.

CHARLES D. NEWTON,
Attorney-General.

[3]

INTRODUCTION TO ANNUAL REPORT.

One of the outstanding features of the litigation handled by the Attorney-General in the year 1921 was the so-called Soldiers' Bonus Case involving the constitutionality of the law enacted by the last Legislature to provide by a bond issue a State bonus to men and women who saw service in the World War.

An action was brought to test the validity of the act. I defended, as constitutional, the statute under which the bonds were issued. The Appellate Division unanimously held that the law was constitutional. The case was appealed to the Court of Appeals. The Court of Appeals decided, by a vote of five to two, that the statute violated the Constitution of the State of New York.

Since the statute was held only to violate the State Constitution, no appeal could be taken to the United States Supreme Court.

The case attracted great public attention and was discussed to a considerable extent in the law journals.

GAS RATE CASES

Twenty suits were brought, either in the Federal or State Courts, to have declared unconstitutional the various acts of the Legislature fixing gas rates. Fourteen were tried and two being tried. One, the *Consolidated Gas Co. v. Newton*, was argued in the United States Supreme Court in November.

Some idea of the magnitude of the work involved in these cases will readily appear, when attention is called to the fact that the record in the case of *Consolidated Gas Co. v. Newton et al.*, in the United States Supreme Court, consists of over 20,000 printed pages, while the brief of the Attorney-General in that case before the lower court, consists of 460 printed pages.

The case of *Brooklyn Union Gas Co. v. Newton et al.*, consists of 7,706 pages printed.

RAILROAD RATE CASES

On October 20 and 21, 1921, there was argued in the United States Supreme Court, the case of *The State of New York v. The United States and The Interstate Commerce Commission*. This involved the validity of the order of the Interstate Commerce Commission made in November, 1920, increasing all passenger fares for travel within the State of New York 20 per cent and adding a Pullman surcharge of 50 per cent which accrued to the

railroads and not to the Pullman Company. The result of this order had been generally to fix the rate for State travel at 3.6 cents a mile except that commutation fares were not affected by the order of the Interstate Commerce Commission.

Various proceedings had been started in the State courts to prevent the railroads from putting into effect the order of the Federal Commission, but without success. All the questions involved in the proceedings before the State courts, and particularly in regard to the injunctions granted by Justice Cropsey of Brooklyn, were presented in the case on appeal before the United States Supreme Court.

Many new and difficult questions arose because of the apparent conflict between the relative jurisdiction of the Federal Interstate Commerce Commission and the State Public Service Commission. These questions could only be solved by a comprehensive proceeding carried on up through the courts until the United States Supreme Court should finally pass upon them.

WORKMEN'S COMPENSATION — MARITIME WORKERS

Nearly 50,000 maritime workers, longshoremen, stevedores and others employed around the docks in New York City, Buffalo and other parts in New York State are unprotected by workmen's compensation as a result of recent decisions by the United States Supreme Court and the New York State Court of Appeals.

This alarming situation was disclosed by the Attorney-General in a letter to United States Senator James W. Wadsworth, asking the latter to use his influence in behalf of a federal workmen's compensation law that would safeguard these maritime employes.

The Attorney-General pointed out in a memorandum summarizing the situation that "in view of the decision of the United States Supreme Court in the case of *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, the law as to maritime workers is in rather a chaotic condition. That decision which was made by a divided court, five to four, held that in the case of maritime injuries the remedy of the employe was in admiralty and that the Congress of the United States could not delegate to the States the right to provide for a compensation law which would apply to maritime workers.

The Court of Appeals of this State, in the cases of *Anderson v. Johnson Lighterage Co.*, 224 N. Y. 539, and *Keator v. Rock Plaster Mfg. Co.*, 224 N. Y. 540, has held that even where the injuries are sustained upon a dock, if the employment of the work-

men is maritime, they are covered by the Admiralty Law and there is no remedy under the Workmen's Compensation Law.

The Court of Appeals has reiterated this doctrine in two cases lately decided, *Newham v. Chile Exploration Co.* and *Insana v. Nordenholt Corp.* In the latter case a petition has been made for a writ of certiorari to review the decision of the Court of Appeals in the United States Supreme Court. Whether the United States Supreme Court will review it rests in its own discretion. If it should reverse the Court of Appeals, the dividing line between admiralty remedies and workmen's compensation would be the water line, injuries on board the vessel being in admiralty and on the dock or pier under the Compensation Law.

CO-OPERATIVE SOCIETY OF AMERICA

The Attorney-General took steps during the year to terminate the existence of the Co-operative Society of America. He designated Frederick R. Rich, a Special Deputy Attorney-General, to examine exhaustively into the activities of the organization with a view to winding up its affairs. An injunction proceeding instituted under the so-called Martin Law which is aimed at unlawful securities enterprises was the means employed to curb the activities of this organization. A selling campaign reached considerable dimensions and was endangering the business of co-operative societies established in this State, which it is the duty of the State Commissioner of Farms and Markets to protect. Complaint against the operations of the society was made to the Attorney-General by Commissioner of Farms and Markets, Hon. Berne A. Pyrke.

Interest centers in this proceeding largely because it is the first exercise of the powers vested in the Attorney-General by the Martin "Blue Sky Law" enacted at the last session of the Legislature.

CAMPAIGN AGAINST LAWBREAKERS

Toward the close of the year Federal Attorney-General Harry M. Daugherty called upon the Attorney-General of New York State and the law officers of other States to join with him in a campaign against profiteering, extortionate price-fixing and lawlessness generally. I immediately replied that New York State could be counted upon to do everything in its power to promote law enforcement. I called a conference of the district attorneys of the State to be held in Albany for the purpose of discussing ways and means of carrying out the purposes of this campaign. The district

attorneys met and perfected a permanent organization and recommended to the Legislature specific amendments to strengthen the hands of law enforcing officers.

KNIGHT ACT — WAR CONTRACTS

Litigation as to the constitutionality of Chapter 459 of the Laws of 1919 reached the final stages during the year.

Briefly, the aim of this statute is to authorize the payment to contractors of the difference between original contract costs and actual expenditures where the latter were increased by war conditions.

The Attorney-General raised the question of the validity of this act when the claim of John T. Gordon, Highway Contractor, was presented to the State Court of Claims. It was contended that the act was in violation of Article III, Section 28 of the State Constitution:

“The Legislature shall not, nor shall the common council of any city, nor any board of supervisors, grant any extra compensation to any public officer, servant, agent or contractor.”

The Court of Claims dismissed the claim.

Upon hearing before the Court of Claims the Attorney-General moved that the claim be dismissed on the ground that the statute of 1919 was in contravention of enumerated provisions of the Constitution. The counsel for the claimant practically conceded that the claim filed was predicated upon and presented under the provisions of the act of 1919 and based upon that statute. The motion of the Attorney-General was granted and the claim dismissed. The Appellate Division reversed the determination and granted a new trial. The Court of Appeals reversed the Appellate Division and held the “Knight Bill,” so-called, to be unconstitutional.

The outcome of this litigation will affect about three hundred claims involving about four million dollars.

NEW YORK CITY BUREAU

My branch in New York City has had an especially busy year due in a large measure to the increased volume of business in connection with the appointment of committees for incompetents. During 1921 the number of proceedings in which committees have been appointed has increased from four hundred and eighty-nine in 1920 to seven hundred and forty-seven. These proceedings involve a large amount of detail work and considerable work on

the part of process servers and clerks is necessary in addition to the work of the deputy in charge of this line.

There has also been an increase in the number of cases involving the collection of franchise taxes due from corporations which are in process of liquidation. Through the co-operation of the State Tax Department I have been enabled to secure tax bills promptly from such corporations in the initial stages of liquidation proceedings in either the State or Federal Courts. Claims have been presented and the cases pursued diligently so that thousands of dollars have been collected for the State which otherwise might have been lost without recourse had the assets been distributed among the creditors.

Owing to the abolition of the State Department of Elections it became necessary at the last election in November for my New York City Bureau to undertake the work of enforcing the provisions of the Election Law in that city and this involved the services of my regular deputies as well as a large number of volunteer deputies who were sworn in during the week preceding election.

Under the so-called Torrens Title Registration Law there has been a steady increase in the number of titles presented for registration, ninety-nine applications having been made to register titles of property during the year 1920 and of this number sixty were granted. The increase in this class of cases is slow but steady and the work involves considerable research.

For the convenience of all interested parties a number of hearings have been held at my New York City Bureau in applications for leave to commence actions in the name of the Attorney-General, in this way time and expense being saved all parties which would otherwise be lost if it were necessary to bring them all before me at my Albany office.

The work in my New York City Bureau is well systematized and under the direction of the deputy in charge is prosecuted with due diligence and care.

WORK FOR STATE HOSPITALS

The work in the bureau devoted to the legal branch of the State Hospitals for the year 1921 has materially increased. The work involves the looking after the affairs of the insane, both civil and criminal, confined in the several State Hospitals. There has been an increasing number of committee appointments for insane soldiers. Five hundred appointments of committees of persons

and properties of insane patients were made through the Albany office. I have been able, through the bureau, to co-operate to a greater extent than ever with the various Red Cross agencies in bringing to a satisfactory determination the claims of the unfortunate insane soldiers due them from the Bureau of War Risk Insurance. The Federal Government has co-operated heartily with this Department and in almost every instance immediate and satisfactory results have been brought about.

Maintenance collected for the year 1921 through committees appointed by the Attorney-General's office amounted to \$349,401.96. The costs collected in the matter of committee proceedings total \$6,879.97. No statutory costs are collected in the cases of insane soldiers. A total of 1,040 committees were appointed by both the New York and Albany office. Three hundred ninety-three miscellaneous actions and proceedings received attention, beside 315 matters in Surrogates' Courts in which the interests of patients were involved.

WORK OF TITLE BUREAU

The titles examined and approved during the year (exclusive of land for State Institutions) involved property for which the State paid approximately \$5,000,000.

This is the largest amount involved in any year since January 1, 1915, and is \$1,000,000 in excess of any previous year.

The matters under consideration may be summarized and classified as follows:

- (a) Barge Canal Lands.
- (b) Reconveyance matters.
- (c) Forest Preserve lands.
- (d) Lands under navigable waters.
- (e) Tunnel between New York and New Jersey.
- (f) Bridges between New York and Pennsylvania.
- (g) Miscellaneous matters.

Of barge canal lands including terminals and reconveyances there are now approximately fifty titles which have not been examined and about two hundred and twenty-five titles examined but not yet approved due to some objections to title. Reconveyance Deeds have been prepared involving sixty parcels of land and there are about fifty matters pending in this line.

The greatest volume of work performed in this Bureau during the year 1921 was in connection with the examination of title to

lands being acquired for State Park purposes in the Adirondack and Catskill Parks, and seven men are now engaged in this work.

In connection with title to lands under navigable waters about twenty-five actions are pending which have been brought in the name of the People to vacate letters patent. Appeals have been taken to the Appellate Division of the Supreme Court for the purpose of securing a final determination as to three questions. Indications are that about two hundred actions must be commenced along this line and before doing so it will be necessary to secure searches, make examinations of titles and prepare complaints, all of which will require a great deal of work. This line alone would require the services of about ten deputies, examiners, stenographers and clerks. This work might be carried on in a larger way, as it is now evident that the State will be successful in securing the return of a large number of valuable parcels of land. It is only by increasing the force that it will be possible to comply with the direction of the Legislature as contained in Chapter 308 of the Laws of 1917.

New York-New Jersey Tunnel.—Between sixty and seventy parcels of land will be required for the approach to and exit from the tunnel on the New York side. Searches have been secured and preliminary examinations of title are about completed.

Bridges between New York and Pennsylvania.—Preliminary examination of title has been practically completed. This work has progressed rather slowly by reason of the fact that the Bridge Companies' record rights did not show title to lands and approaches to be acquired.

Many unusual and complicated title questions have been presented in connection with the examination of titles due to the character of the property involved, that is, water rights, forest lands, bridges, lands under water and tax titles. It is only by reason of the fact that the men who are performing these services are especially skilled and trained that the work is being conducted in a comprehensive and satisfactory manner.

LAND BUREAU

The work in the Land Bureau of this department during the year covered fifty-six applications made to the Commissioners of the Land Office in which legal questions were involved. Among others was an application by the United States of America for a water grant of fifteen acres at Federal Dam at Troy, N. Y., to be acquired for the use of Henry Ford & Son; also one by the city

of Troy, N. Y., for sixteen parcels of land under water at the foot of several city streets. Other applications were for water grants made by Brooklyn Union Gas Company, Staten Island Ship Building Company, city of Buffalo, city of New York, and others, involving many acres of valuable water lots. The application of the city of New York is for 160 acres under the Atlantic ocean at Coney Island and is desired by the city for the purpose of erecting thereon a boardwalk estimated to cost \$4,000,000.

This bureau of my department also negotiated the sale of the Quarantine establishment in the Port of New York to the Federal Government and prepared an abstract of title of the Quarantine Station at Rosebank on Staten Island and of Swinburn and Hoffman islands in the lower bay of New York, resulting in the receipt by the State of a United States Treasury Draft of \$1,395,275 as consideration for said property.

Among various land titles examined and approved by this bureau were those of many parcels acquired in the city of Cortland for a new site for the State Normal School of that city.

WORKMEN'S COMPENSATION LAW

Under the Workmen's Compensation Law, 757 notices of appeal to the Appellate Division of the Supreme Court were served on this department.

During the year 1921, two hundred and eight (208) cases were argued and submitted in the Appellate Division of the Supreme Court, of which cases 148 were affirmances, in 30 the awards were reversed and dismissed, in 27 the awards were reversed and remitted to the State Industrial Commission and there were 3 cases in which the awards were modified.

In the Court of Appeals 42 cases were argued and submitted, in 24 of which the orders of the Appellate Division were affirmed, in 4 the orders of the Appellate Division were reversed and in 3 the orders of the Appellate Division reversed and the case remitted to the Industrial Board.

In 3 cases the orders of the Appellate Division were reversed upon the appeal of the Attorney-General and in 8 cases the orders of the Appellate Division were affirmed where the Attorney-General took the appeal.

One (1) case was argued in the Supreme Court of the United States and is still undecided.

BUREAU OF EXCISE

This Bureau came into existence as a result of the enactment of chapter 155 of the Laws of 1921, which was signed by the Governor on the 4th day of April, 1921, and transferred the Excise Department, as existing under the provisions of the Liquor Tax Law, to the jurisdiction of the Attorney-General. The Bureau has charge of all unfinished business of the Excise Department, both administrative and legal, which business includes the prosecution of actions and proceedings brought by the former State Commissioner of Excise and the defense of proceedings pending against the former State Commissioner of Excise, and those brought against the Attorney-General since the 4th day of April, 1921, as the successor of the former State Commissioner of Excise; the collection of taxes due to the State under laws existing prior to April 4, 1921; the collection of fines and penalties for violations of the Liquor Tax Law up to the date of its repeal; the examination of claims for rebate on certificates surrendered; the payment of such claims and the defense of proceedings brought to compel payment where claims are not recognized; the redemption of unused liquor tax stamps, which involves the examination of claims made for such redemption, and the checking up of reports of business done by the holders of such unredeemed stamps. In addition to the business incident to closing the affairs of the former Department of Excise, the Bureau attends to correspondence relating to the existing prohibition laws; refers complaints to the proper officials for their attention and advises in proper cases with respect to the duties of officers and generally as to the construction of the statute. From the 4th day of April, 1921, to January 1, 1922, this Bureau has received in taxes, fines, penalties, and interest, the sum of \$30,727.58, of which there has been paid into the State Treasury, \$17,578.60. The balance has been distributed to the localities entitled under the law to share in the distribution.

In the administration of the Attorney-General's office, the faithfulness, loyalty and devotion of every member of the staff, which I deeply appreciate, has played a most important part.

Attached hereto will be found a summary of the work for the year 1921.

Dated *January 1, 1922.*

CHARLES D. NEWTON,
Attorney-General.

SUMMARY

New Actions and Proceedings of a general nature commenced during 1921, comprising:

Workmen's compensation cases.	
Foreclosures of mortgages.	
Voluntary dissolutions.	
Involuntary dissolutions.	
Partitions.	
Actions to register title to real property.	
Applications for surrender of securities.	
Collections of premium on State insurance policies.	
Court and trust fund actions.	
Certiorari.	
Mandamus.	
Injunctions.	
To vacate letters patent.	
Sequestrations.	
Foreclosure of mechanics' liens.	
Foreclosure of loan commissioners' mortgages.	
Habeas corpus.	
Condemnation proceedings.	
Admeasurement of dower.	
Applications to amend certificate.	
Actions against State police.	
Applications for change of name.	
Escheats.	
Elimination of grade crossings.	
To reform deeds.	
To quiet title.	
To abate nuisances.	
Receiverships.	
Construction of will.	
Bankruptcy proceedings.	
Proceedings in Surrogate's Court.	
And Sundry miscellaneous cases.	
Total	2,298
Special franchise proceedings	515
State hospital proceedings (new, committee proceedings) . .	428
Violations of Agricultural Law	1,857
Actions under Conservation Law	50
Claims against the State filed in Court of Claims	299

COLLECTIONS FOR THE YEAR ENDING DECEMBER 31, 1921

Agricultural Bureau	\$56,513 68
Hospital Bureau	11,332 24
Conservation Bureau	3,476 45
Corporation Tax Bureau.....	55,376 68
U. S. Deposit Fund Mortgages (principal and interest).....	2,828 05
Judicial settlement, estates of decedents.....	23,950 76
Rents from escheated estates.....	744 25
Premiums, State Insurance Fund.....	4,284 27
Costs in actions and proceedings.....	8,026 64
Penalties, violations dentistry practice.....	843 93
Excise fines and penalties.....	493 55
Motor vehicle fines and penalties.....	2,751 00
Fees, Boxing Commission.....	177 00
Damages, contract violations.....	22,000 00
Liability on bonds.....	788 60
Maintenance, Rome State School.....	1,604 51
Rent arrears, Sing Sing Prison factory.....	1,000 00
Refund of salary.....	35 00
Refund of traveling expenses.....	2 45
Sale of equipment.....	12 00
Dividend Carnegie Trust Co. Liquidation.....	8 34
Interest on bank balance (Excise Bureau).....	39
Sale of property (Quarantine Station).....	1,395,275 00

\$1,591,524 79

Number of bonds examined.....	1,516
Value of bonds examined.....	\$171,555,965 48
Number of contracts examined.....	57
Consents and agreements for the withdrawal of retained percentages, work for various State constructions.....	23
Number of legal papers and proceedings for bond issues by cities, etc.....	31
Number of insurance charters examined.....	80
Number of certificates of incorporation examined.....	84
Number of applications presented to the Land Board and examined.....	66

Applications for leave to commence actions in the name of the people presented to this Department.....	18
Number of actions and proceedings tried in 1921.....	2,405
Number of cases appealed in 1921.....	868
Number of motions.....	1,499
Total of actions and proceedings undisposed of besides appeals.....	11,725

Cases pending in Appellate Division, Court of Appeals and United States Supreme Court on January 1, 1921:

	App. Div.	Ct. of Appeals
Appeals from judgments or orders of Court of Claims.....	54	12
Appeals from orders and judgments other than from Court of Claims.....	118	29

Cases appealed to Appellate Courts between January 1, 1921, and January 1, 1922:

	App. Div.	Ct. of Appeals
Appeals from judgments or orders of Court of Claims.....	28	6
Appeals from orders and judgments other than from Court of Claims.....	860	68

Cases in United States Supreme Court, United States Circuit Court, and Federal Court..... 15

COURT OF CLAIMS BUREAU DURING YEAR 1921

7,264 claims disposed of during 1921, in which the amounts total.....	\$13,661,200 88
327 claims, in which awards were made, total.....	3,091,068 74
409 miscellaneous claims were dismissed.	
6,628 claims based on an enabling act of chapter 581, Laws of 1918, for bank depositors of the insolvent Brooklyn banks were dismissed by a test case of Jennie Sherlock by unanimous decision of the Appellate Division, December 7, 1921, totaling ..	6,131,960 42

The amount to be paid by the State in claims during 1921..... \$3,091,068 74

Total amount claimed in claims against the State	\$13,661,200 88
The difference between amount claimed and allowed in claims in 1921, which is the amount saved to the State is....	10,570,132 14

BUREAU OF AGRICULTURAL AFFAIRS

The total number of violations referred to this office by the Department of Farms and Markets during the year 1921 was	1,857
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The amount recovered for penalties and in satisfaction of judgments and paid over to the State Treasurer was	\$56,513 68
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Detailed monthly reports are on file in this office with the deputy in charge of this bureau and at the office of the Department of Farms and Markets.

PROCEEDINGS PENDING IN APPELLATE COURTS**UNITED STATES SUPREME COURT.**

The People of the State of New York *ex rel.* The Pierce-Arrow Motor Car Company, *v.* The State Tax Commission. (To review franchise tax. To be argued.)

The State of New York and Charles D. Newton, as Attorney-General, *etc.*, *v.* The United States and the Interstate Commerce Commission, *et al.* (Railroad rates. Argued, but not decided.)

Taggart's Paper Company *v.* The State of New York. (Claim for appropriation of land by State. To be argued.)

In the Matter of the Claim of Guiseppe Insana, *v.* Nordenholz Corporation, *et al.* (Workmen's Compensation. To be argued.)

Consolidated Gas Company *v.* Charles D. Newton, as Attorney-General, *et al.* (Rate for Gas. Argued, but not decided.)

New York & Queens Gas Company *v.* Charles D. Newton, as Attorney-General, *et al.* (Rate for Gas. To be argued.)

Kings County Lighting Company *v.* Charles D. Newton, as Attorney-General, *et al.* (Rate for Gas. To be Argued.)

Central Union Gas Company *v.* Charles D. Newton, as Attorney-General, *et al.* (Rate for Gas. To be argued.)

Northern Union Gas Company *v.* Charles D. Newton, as Attorney-General, *et al.* (Rate for Gas. To be argued.)

Brooklyn Union Gas Company *v.* Charles D. Newton, as Attorney-General, *et al.* (Rate for Gas. To be argued.)

New York Mutual Gas Light Company *v.* Charles D. Newton, as Attorney-General. (Rate for Gas. To be argued.)

Newtown Gas Company *v.* Charles D. Newton, *et al.* (Rate for Gas. To be argued.)

Saranac Land and Timber Company *v.* James A. Roberts, as Comptroller. (Ejectment—lands in Adirondacks. To be argued in United States Circuit Court of Appeals.)

State of New York and James A. Wendell, as Comptroller, *v.* Saranac Land and Timber Company. (Injunction to restrain defendant from litigating further with State over title to forest land. To be argued in United States Circuit Court of Appeals.)

Edward A. Levy Leasing Company *v.* Jerome Siegel, *et al.* (Constitutionality housing law. To be argued.)

People *ex rel.* Brixton Operating Corporation *v.* Edward B. LaFetra, *et al.* (Housing Law. To be argued.)

810 West End Avenue, Inc., *v.* Henry R. Stern. (Housing Law. To be argued.)

COURT OF APPEALS.

Belmar Contracting Company, Inc., Respondent, v. the State of New York, Appellant. (Damages — Construction of State Highway No. 5574. To be argued.)

Eugene M. Travis, as Comptroller of the State of New York, Appellant, v. American Cities Company, et al., Respondents. (Stock Transfer Tax. To be argued.)

The People of the State of New York, Appellant, v. The National Security Company, Respondent. (Submitted controversy re-taxation. Argued but not decided.)

The Foundation Company, Appellant, v. The State of New York, Respondent. (Claim for work on contract for construction of lock, Mohawk River. To be argued.)

The People of the State of New York, Appellant, v. The Long Island Railroad Company, et al., Respondents. (Rate of Fare. To be argued.)

Michael J. Callanan, et ano., Appellants, v. The State of New York, Respondents. (Claim for premium on compensation insurance on Highway Contract. To be argued.)

The People of the State of New York, Respondent, v. George Baldwin, Appellant. (Trespass. To be argued.)

The People of the State of New York, Appellant, v. Clarence L. Fisher, et al., Respondents. (Title to land. To be argued.)

In the Matter of the Application of the People of the State of New York for payment of award, etc., in proceedings to open Melrose avenue in the City of New York; City of New York Appellant, The People of the State of New York, Respondent. (To be argued.)

The People of the State of New York, ex rel. New York Life Insurance Company, Respondent, v. The State Tax Commission, Appellant. (Certiorari to review tax determination. To be argued.)

John H. Gordon, Respondent, v. The State of New York, Appellant. (Claim on Highway Contract. To be argued.)

Andrew Lewis, as Administrator of the Estate of Julius Lewis, deceased, Appellant, v. The State of New York, Respondent. (Personal injury in State armory. To be argued.)

The People of the State of New York, Respondent, v. The Chateaugay Ore and Iron Company, et al., Appellants. (Title to Land. To be argued.)

Chicago Great Western Railroad Company, Appellant, v. The State of New York, Respondent. (Claim for refund on stock transfer tax stamps. To be argued.)

People ex rel. Gustave Konigswald, Appellant, v. James A. Wendell, as Comptroller of the State of New York, Respondent. (To review Income Tax determination. To be argued.)

People ex rel. The New York Central Railroad Company v. the Public Service Commission of the State of New York, Second District, Appellant. (Operation of Railroad at Erie Basin, Buffalo. To be argued.)

The New York Central Railroad Company, Appellant, v. The People of the State of New York, City of Little Falls, et al., Respondents. (Condemnation proceeding. To be argued.)

People ex rel. Lillian James, Appellant, v. Ethan A. Nevin, as Superintendent of State School at Newark, N. Y. (Habeas Corpus. To be argued.)

APPELLATE DIVISION — FIRST DEPARTMENT

In the Matter of Knickerbocker Life Insurance Company; State Superintendent of Insurance, Appellant. (Re transfer of securities to receiver of company. To be argued.)

In the Matter of Eclectic Life Insurance Company; State Superintendent of Insurance, Appellant. (Re transfer of securities to receiver of company. To be argued.)

In the Matter of International Insurance Company; State Superintendent of Insurance, Appellant. (Re transfer of securities to receiver of company. To be argued.)

People ex rel. Daniel O'Connell, Respondent, v. State Civil Service Commission, Appellant. (Mandamus — clerk in New York County Clerk's Office. To be argued.)

People ex rel. Thomas V. Devins, Appellant, v. Henry D. Sayer, as Industrial Commissioner, Respondent. (Mandamus to compel reinstatement as factory inspector. To be argued.)

People ex rel. Andrew P. Meehan, Appellant, v. Henry D. Sayer, as Industrial Commissioner, Respondent. (Mandamus to compel reinstatement as factory inspector. To be argued.)

Kings County Lighting Company v. Egburt E. Woodbury, as Attorney-General, et al. (Gas Rate. Argued but not decided.)

APPELLATE DIVISION — SECOND DEPARTMENT.

Howard G. Bishop, et al., Appellants, v. William P. Thomas, Respondent. (Partition of land. To be argued.)

The People of the State of New York, Appellant, v. Benjamin Traktman, et al., Respondents. (Revocation of water grants. (To be argued.)

Hollis A. Sanderson, et al., Respondent, v. Frank Cooley, Appellant. (Partition of land — possible escheat. To be argued.)

In the Matter of the Judicial Settlement of the Account of Samuel P. Davidge, et al., as Executors of the Last will of Florence H. Davidge, deceased. (Validity of gift for educational purposes. (To be argued.)

In the Matter of the Application of Adele Mellor for a Writ of Habeas Corpus, etc., v. Mary Hinckley, as Superintendent of New York State Training School for Girls, Appellant. (To be argued.)

Long Island Railroad Company, Appellant, v. John Adikes, Respondent. (Condemnation proceeding. Pending.)

New York and Richmond Company v. Charles D. Newton, as Attorney-General, et al. (Gas Rate. To be argued.)

APPELLATE DIVISION — THIRD DEPARTMENT

Fred Volkosh, Claimant-Appellant, v. State of New York, Defendant-Respondent. (Damage for alleged negligence in maintaining culvert. To be argued.)

Julia A. Hooper and Gordon G. Foley, Claimants-Appellants, v. State of New York, Defendant-Respondent. (Destruction of crops due to canal leakage. To be argued.)

Michael Wisnock, et al., Claimants-Appellants, v. State of New York, Defendant-Respondent. (Negligence — flooding from culvert. To be argued.)

J. Van Vechten Olcott, as Receiver, etc., of Ferguson Contracting Co., Claimant-Appellant, v. State of New York, Defendant-Respondent. (To be argued.)

Joseph Derrick, Claimant-Appellant, v. State of New York, Defendant-Respondent. (Damage to crops. To be argued.)

In the Matter of the Application of the Town of Colonie v. Public Service Commission, Second District. (Certiorari to review determination of Public Service Commission in regard to the construction of Tracks. To be argued.)

People of the State of New York, Plaintiff-Respondent, v. Jennie H. Ladew et al., Defendants-Appellants. (Title to Property. To be argued.)

Municipal Gas Company of the City of Albany, Plaintiff-Respondent, v. The Public Service Commission, Second District,

et al., and Charles D. Newton, Attorney-General, Appellants. (Appeal from Order of Hasbrouck, J., directing that injunction pendente lite should issue. To be argued.)

Horrocks Desk Company, Claimant-Appellant, v. State of New York, Defendant-Respondent. (Claim for \$39,600 for damage due to overflow, West Canada Creek and Barge Canal. To be argued.)

The People of the State of New York ex rel. Newman-Andrews Company, v. Walter H. Knapp et al. constituting State Tax Commission. (Certiorari to review tax assessment under Article 9-A of Tax Law. To be argued.)

Sylvester B. Tripp, Claimant-Appellant, v. State of New York, Defendant-Respondent. (Breach of Agreement. To be argued.)

In the Matter of the Judicial Settlement of the Account of Administrators of the Goods, etc., of Carl L. Chamberlin, deceased. (Escheat. To be argued.)

Ferguson Contracting Company, Claimant-Appellant, v. State of New York, Defendant-Respondent. (Claim for amount remaining due under Barge Canal Contract No. 2. To be argued.)

Fulton Engineering Company, Inc., Claimant-Appellant, v. State of New York, Defendant-Respondent. (Claim for damages due to increased cost and expense of work, State Highway Contract No. 1271, Delaware County. To be argued.)

William B. Armstrong Company, Claimant-Appellant, v. State of New York, Defendant-Respondent. (Breach of Contract on heating and water supply contract at Women's Reformatory, Bedford Hills. To be argued.)

The People of the State of New York ex rel. Martha Mead, Relator-Respondent, v. Ethan A. Nevin, as Superintendent of the State Custodial Asylum for Feeble-Minded Women at Newark, N. Y., Appellant. (Habeas Corpus. To be argued.)

Matteo Lavenia, Claimant-Appellant, v. State of New York, Defendant-Respondent. (Personal Injury. To be argued.)

The People of the State of New York v. New York Central Railroad Company et al. (Rate of Fare. To be argued.)

People ex rel. Union Bag and Paper Corporation, v. Walter H. Knapp, et al. as the State Tax Commission. Action No. 2 (Certiorari to review Franchise Tax Determination. To be argued.)

G. Edward Laing, Herbert Horton, and Howard W. Laing, Claimants-Appellants, v. State of New York, Defendant-Respondent. (Breach of promise on contract for construction of Highway No. 5230. To be argued.)

Julia A. Hooper et al., Claimant-Appellant, v. State of New York, Defendant-Respondent. (Claim for destruction of crops due to canal leakage. To be argued.)

William Tryon and Albert Tryon, Claimants-Appellants, v. State of New York, Defendant-Respondent. (Damage by canal leakage. To be argued.)

Morris Morris, Claimant-Appellant, v. State of New York, Defendant-Respondent. (Destruction of crops by canal leakage. To be argued.)

Terrence Lambert, Claimant-Appellant, v. State of New York, Defendant-Respondent. (Destruction of crops by canal leakage. To be argued.)

John J. Houck, Claimant-Appellant, v. State of New York, Defendant-Respondent. (Damage to crops by canal leakage. To be argued.)

Henry Angemire and William F. Roberts, Claimants-Appellants, v. State of New York, Defendant-Respondent. (Destruction of crops by canal leakage. To be argued.)

Empire United Railways, Inc., Claimant-Appellant, v. State of New York, Defendant-Respondent. (Claim for damage due to flooding. To be argued.)

Frances G. Myers, Claimant-Appellant, v. State of New York, Defendant-Respondent. (Damages to property due to change of grade. To be argued.)

J. Van Vechten Olcott, as Receiver of Ferguson Contracting Co., Claimant-Appellant, v. State of New York, Defendant-Respondent. (Damages on Barge Canal Contract. To be argued.)

People of the State of New York, Plaintiff-Appellant, v. Horace W. Downey, Defendant-Respondent. (Violation of Conservation Law. To be argued.)

Etheline H. Hinckley, Claimant-Respondent, v. State of New York, Defendant-Appellant. (Appropriation of land for barge canal. To be argued.)

People ex rel. Ernest G. Safio, Relator-Appellant, v. The Superintendent of the New York State Hospital for Criminal Insane at Dannemora, N. Y., Respondent. (Habeas Corpus. To be argued.)

Rockaway Pacific Corporation, Claimant-Respondent, v. State of New York, Defendant-Appellant, — and — The City of New York, Claimant-Respondent, v. State of New York, Defendant-Appellant. (Occupation of land at Far Rockaway. To be argued.)

The People of the State of New York, Plaintiff-Appellant, v. Clarence Longwell, Defendant-Respondent. (Violation of Game Law. To be argued.)

Jacob W. Holler and Stanley Shepard, Claimants-Appellants, v. State of New York, Defendant-Respondent. (Alleged extra cost in connection with Contract 27-A originally held by Kinser Construction Company. To be argued.)

Frank Best, as Administrator, etc. of William Best deceased, Claimant-Appellant, v. State of New York, Defendant-Respondent. (Negligence. To be argued.)

New Paltz, Highland & Poughkeepsie Traction Company, Plaintiff-Appellant, v. State Tax Commission, Defendant-Respondent. (Special Franchise. To be argued.)

Denis E. Foley, Claimant-Appellant, v. State of New York, Defendant-Respondent. (Claim for damages because of alleged unlawful detention of claimant in State Hospital for Insane at Wards Island. To be argued.)

Vincent Moffat, Claimant-Appellant, v. State of New York, Defendant-Respondent. (To be argued.)

Atlantic Gulf and Pacific Company, Claimant-Appellant, v. State of New York, Defendant-Respondent. (Action on Contract. To be argued.)

In the Matter of The Petition of the State Highway Commission under Section 91 of the Railroad Law that a grade crossing of the Erie Railroad and County Highway No. 834 in the Town of Kirkwood, Broome County, be eliminated, Erie Railroad Company, Appellant, State Highway Commission and others, Respondents. (To be argued.)

Back Woods Club, Claimant-Respondent, v. State of New York, Defendant-Appellant. (To be argued.)

Emily M. Keenan and Frank Goodwin, as Administrator, etc., of Daniel F. Keenan, deceased, Claimants-Appellants, v. State of New York, Defendant-Respondent. (To be argued.)

People of the State of New York, ex rel. John R. Keim, Relator, v. James A. Wendell, as Comptroller of the State of New York, Respondent. (Certiorari to review Income Tax return. To be argued.)

Saranac Land & Timber Company, Plaintiff-Respondent, v. James A. Roberts, as Comptroller of the State of New York, Defendant-Appellant. Action No. 2. (To be argued.)

Thomas F. Shaughnessy, Claimant-Appellant, v. State of New York, Defendant-Appellant. (Alleged increase in the cost of material, work etc., on Highway No. 5637, Washington County. To be argued.)

Cornelius Kahlen, et al. Claimants-Appellants, v. State of New York, Defendant-Respondent. (Appropriation of land for barge canal terminal. To be argued.)

People ex rel. Frederick C. Gratwick, v. Harry C. Walker, et al., as Commissioners of Land Office. (Certiorari to review determination of Commissioners of Land Office in granting application of F. Barnheisel for land under water. To be argued.)

People ex rel. Frank W. Woolworth, Relator, v. State Tax Commission, Respondent. (Certiorari to review determination of Comptroller under Article 16 of Tax Law. To be argued.)

People ex rel. DeLaVergne Machine Company, Relator, v. State Tax Commission, Respondent. (Certiorari to review tax assessment of September 26, 1921. To be argued.)

People ex rel. United Hotels Company of America, v. State Tax Commission. (Certiorari to review tax assessment. To be argued.)

People ex rel. Societe Anonyme Des Anciens Etablissements C. & E. Chapal Freres & Cie, Relator, v. State Tax Commission of the State of New York, Respondents. (Certiorari to review determination of State Tax Commission. To be argued.)

People ex rel. Terminal & Town Taxi Corporation, Relator, v. State Tax Commission of the State of New York, Respondents. (Certiorari to review determination of State Tax Commission. To be argued.)

In the Matter of the Application of Frederick H. Cone & Co. Inc., for a Writ of Certiorari to State Tax Commission of the State of New York. (Certiorari to review determination of State Tax Commission.)

APPELLATE DIVISION — FOURTH DEPARTMENT.

The City of Utica v. William W. Wotherspoon, as Superintendent of Public Works. (Injunction to restrain hoisting canal bridge at Utica. To be argued.)

People of the State of New York v. Charles T. Sperry. (To recover possession of land in the Adirondacks. To be argued.)

George Pronoth, as Executor, etc., of William Pronoth, deceased, Claimant-Appellant, v. The State of New York, Defendant-Re-

spondent. (Damages to premises due to alleged negligent construction of north bank of barge canal. To be argued.)

Dorothy Green v. State of New York. (Negligence operating automobile of New York State College of Agriculture. To be argued.)

George H. Odell, as Administrator of the estate of Harlow B. Odell, deceased, Claimant-Appellant, v. The State of New York, Defendant-Respondent. (Claim for damages. To be argued.)

Morrison & Quinn, Inc., Claimant-Appellant, v. The State of New York, Defendant-Respondent. (Breach of Contract for junction dam at Mohawk, N. Y. To be argued.)

Nettie M. Barnhart, et al., Claimants-Appellants, v. The State of New York, Defendant-Respondent. (Claim for alleged damages. To be argued.)

Chester W. Conant, et al., Claimants-Respondents, v. The State of New York, Defendant-Appellant. (To be argued.)

Dale Engineering Company, Claimant-Appellant, v. State of New York, Defendant-Respondent. (Constitutionality of Chapter 459, Laws of 1919. To be argued.)

John M. Sutton, Plaintiff-Appellant, v. Ontario Dairy Company, Inc., et al., and the People of the State of New York, Defendants-Respondent. (Foreclosure action. To be argued.)

Angelo M. Paduano, Claimant-Respondent-Appellant, v. The State of New York, Defendant-Appellant-Respondent. (Alleged Damages to Quarry due to leakage from Erie Canal. To be argued.)

Lyman W. Robinson, Claimant-Appellant, v. The State of New York, Defendant-Respondent. (Claim for destruction of crops and damage to lands. To be argued.)

Kate E. Smith, as Administratrix of Estate of George R. Smith, Claimant-Appellant, v. The State of New York, Defendant-Respondent. (Oriskany Creek flooding. To be argued.)

Edwin Gaffey, Claimant-Respondent, v. The State of New York, Defendant-Appellant. (Negligence — Damage to land and crops of claimant by backing up of Oneida River. To be argued.)

Michael H. Ripton, Claimant-Appellant, v. State of New York, Defendant-Respondent. (Negligence. To be argued.)

J. Garrett Hotaling, et al. Claimants-Appellants, v. The State of New York, Defendant-Respondent. (Appropriation of land for Canal and damages to property. To be argued.)

Thaddeus C. Sweet, as sole surviving partner of Kirk N. Sweet & Thaddeus C. Sweet, doing business under the style and name of Sweet Brothers Paper Manufacturing Company, Respondent, v. The State of New York, Appellant. (Claim for pollution of waters. To be argued.)

ACTIONS AND PROCEEDINGS INSTITUTED AGAINST STATE OFFICIALS DURING THE YEAR 1921

- Jan. 6. Supreme Court — Albany County. The People of the State of New York ex rel. M. Orme Wilson v. James A. Wendell as Comptroller of the State of New York. (Certiorari to review income tax determination.)
11. Supreme Court — Albany County. In the Matter of the Application of Edward Klauber for a Writ of Certiorari to James A. Wendell as Comptroller of the State of New York. (Certiorari to review income tax determination.)
14. Supreme Court — Monroe County. George Douglas Miller v. Edward S. Walsh, Ind., and as Superintendent of Public Works of the State of New York. (Injunction. Restrain removal of building. Motion denied. Order of discontinuance entered.)
21. Supreme Court — Albany County. The People of the State of New York ex rel. Robert S. Brewster v. James A. Wendell as Comptroller of the State of New York. 196 A. D. 613. (Certiorari, income tax on gifts.)
28. Supreme Court — Albany County. The People of the State of New York ex rel. American Radiator Company v. State Tax Commission of the State of New York. (Certiorari to review tax assessment for 1918.)
- Feb. 10. Supreme Court — Albany County. The People of the State of New York ex rel. Central Union Trust Co. of New York, Trustee of the Estate of Marcia Ann Gavit v. James A. Wendell as Comptroller of the State of New York. (Certiorari. To review income tax assessment.)
24. Supreme Court — Albany County. The People of the State of New York ex rel. Emeline F. Clyde v.

- James A. Wendell as Comptroller of the State of New York. (Certiorari to review income tax.)
- March 4. The People of the State of New York ex rel. Central City Trust Co. v. Herbert S. Sisson as Commissioner of Highways of the State of New York. (Mandamus. To compel payment on contract road 1074.)
11. Supreme Court — New York County. In the Matter of the Application of Henry B. Twombly for a writ of certiorari to James A. Wendell as Comptroller of the State of New York. (Certiorari to review income tax.)
11. Supreme Court — Niagara County. The Shredded Wheat Company v. George E. Hogue as Commissioner of the Division of Agriculture of the Department of Farms and Markets of the State of New York. (Injunction.)
16. Supreme Court — Albany County. The People of the State of New York ex rel. Head's Iron Foundry v. State Tax Commission of the State of New York. (Certiorari to review tax assessment for 1920.)
18. Supreme Court — Albany County. In the Matter of the Application of Gustave Konigswald for a Writ of Certiorari to James A. Wendell as Comptroller of the State of New York. (Certiorari to review income tax. Determination confirmed.)
- Supreme Court — Albany County. In the Matter of the Application of Richard J. Cashion for a Writ of Peremptory Mandamus to Otto Jantz as State Superintendent of Public Buildings of the State of New York. (Mandamus for reinstatement as laborer.)
23. Supreme Court — Kings County. Frank D. Jennings v. Walter Herrick Commission of Narcotic Drug Control of the State of New York. (Injunction.)
31. Supreme Court — The People of the State of New York ex rel. Terminal and Town Taxi Corporation v. State Tax Commission of the State of New York. (Certiorari. To review franchise tax determination.)
31. Supreme Court — Kings County. In the Matter of the Application of James Twyford for a Writ of

April 2. Supreme Court — Albany County. The People of the State of New York ex rel. John R. Keim v. James A. Wendell as Comptroller of the State of New York. (Certiorari. To review income tax determination. Writ granted.)

5. Supreme Court — New York County. The City of New York v. William R. Willcox, Eugenius H. Outerbridge and Murray Hulbert as Commissioners and Charles D. Newton as Attorney-General of the State of New York. (Injunction to restrain agreement between States of New York and New Jersey, port development. Application denied.)

22. Supreme Court — Albany County. The People of the State of New York ex rel. J. Frederic Kernochan et al. as Committee of Marie Marshall, incompetent, v. James A. Wendell as Comptroller of the State of New York. (Income tax.)

25. Supreme Court — Albany County. City of New York v. George McAneny et al as Transit Commissioners. (Injunction. Constitutionality Chapter 134, Laws 1921.)

June 3. Supreme Court — New York County. The People of the State of New York ex rel. Edward F. Boyle v. Michael J. Cruise as City Clerk of the City of New York et al. (Mandamus. To reapportion aldermanic districts.)

3. Supreme Court — New York County. The People of the State of New York ex rel. Patrick J. Carlin v. Civil Service Commission of the State of New York et al. (Mandamus. Position of Deputy Commissioner of Plants and Structures. Order entered granting peremptory writ.)

11. Supreme Court — Albany County. The People of the State of New York v. The Westchester County National Bank of Peekskill, New York. (Constitutionality of Soldiers' Bonus Law.)

13. Supreme Court — The People of the State of New York ex rel. Heyden Chemical Com-

- pany of America, Inc. v. State Tax Commission. (Certiorari to review tax assessment.)
- June 24. Supreme Court — Albany County. The People of the State of New York ex rel. William H. Mott v. State Civil Service Commission for a Writ of Mandamus. (Mandamus. Position of court attendant, Nassau County.)
29. Supreme Court — New York County. The People of the State of New York ex rel. E. H. Miller v. Hon. Nathan L. Miller, Governor et al. (Constitutionality of act creating Transit Commission. Motion dismissed.)
- Supreme Court — Albany County. People of the State of New York ex rel. Northern Finance Corporation v. State Tax Commission. (Certiorari. To review determination of Tax Commission in assessing tax.)
29. Supreme Court — Albany County. The People of the State of New York ex rel. H. H. Babcock Company v. State Tax Commission. (Certiorari. To review determination of Tax Commission in assessing tax.)
- July 2. Supreme Court — New York County. In the Matter of the Application of Abraham Bernstein for a Writ of Mandamus v. Henry D. Sayer, Industrial Commissioner of the Department of Labor of State of New York. (Mandamus. Position of accountant, State Fund. Motion for mandamus denied.)
11. Supreme Court — New York County. In the Matter of the Application of John Nemeth for an order directing the State Banking Dept. to deliver to him certain securities deposited by him in connection with private banking. (Order entered granting motion.)
15. Supreme Court — New York County. The People of the State of New York ex rel. Angelo A. DeVito v. Henry D. Sayer, The Industrial Commission of the State Department of Labor. (Mandamus. To compel reinstatement as Law Clerk, State Industrial Com'n. Writ denied.)
15. Supreme Court — Albany County. The People of the State of New York ex rel. Estate of Frank W.

Woolworth, Dec'd v. The State Tax Commission.
(Certiorari to review determination of Comptroller under Art. 16 Tax Law.)

July 21. Supreme Court — Westchester County. In the Matter of the Application of John F. Manning for a writ of Mandamus v. State Tax Commission of the State of New York. Mandamus. Position of Examiner of Transfer of Stock.)

Aug. 11. Supreme Court — Albany County. In the Matter of the Application of Miles S. B. Knights for a peremptory writ of mandamus against Ellis J. Staley as Conservation Commissioner of the State of New York. (Mandamus. To compel revocation of suspension from position of game protector.)

27. Supreme Court — New York County. In the Matter of the Application of Andrew P. Meehan for a writ of mandamus against Henry D. Sayer, The Industrial Commissioner of the Department of Labor of the State of New York. (Mandamus. To compel reinstatement as factory inspector.)

27. Supreme Court — New York County. In the Matter of the Application of Thomas V. Devins for a writ of mandamus against Henry D. Sayer, The Industrial Commissioner of the Department of Labor of the State of New York. (Mandamus. To compel reinstatement as factory inspector.)

30. Supreme Court — New York County. In the Matter of the Application of Levi R. Brodhead for a writ of mandamus to The Board of Managers of the Manhattan State Hospital. (Mandamus. Reinstatement as Captain of S. S. "Parkhurst." Motion denied.)

Sept. 3. Supreme Court — Albany County. In the Matter of the Application of Coney Island and Brooklyn Railroad Company and Lindley M. Garrison as Receiver for a writ of certiorari directed to State Tax Commission. (Certiorari, Revision of taxes under Sec. 185 Tax Law. Pending.)

3. Supreme Court — Albany County. In the Matter of the Application of The Nassau Electric Railroad Co., etc., for a writ of certiorari directed to the State Tax Commission. (Certiorari. Revision of Taxes under Sec. 185, Tax Law. Pending.)

- Sept. 3. Supreme Court — Albany County. In the Matter of the Application of Brooklyn, Queens County & Suburban Railroad Company, etc., for a writ of certiorari directed to the State Tax Commission. (Certiorari. Revision of taxes under Sec. 185, Tax Law. Pending.)
3. Supreme Court — Albany County. In the Matter of the Application of New York Consolidated Railroad Company, etc., for a writ of certiorari directed to the State Tax Commission. (Certiorari. Revision of taxes under Section 185, Tax Law. Pending.)
12. Supreme Court — Chautauqua County. Harmon W. Wolber and Ida Wolber, Taxpayers in Village of Fredonia, N. Y., et al. v. Herbert S. Sisson as Commissioner of Highways of the State of New York, et al. (Injunction to prevent improvement of West Main Street. Pending.)
15. Supreme Court — Albany County. The People of the State of New York ex rel. the United Hotels Company of America v. State Tax Commission et al. (Certiorari. To review tax assessment. Pending.)
19. Supreme Court — Kings County. The People of the State of New York ex rel. Societe Anonyme des Anciens Etablissements C. & E. Chapal Freres & Co. v. State Tax Commission of the State of New York. (Certiorari. To review tax determination of Aug. 18, 1921. Pending.)
19. Supreme Court — New York County. In the Matter of the Application of Daniel O'Connell for a writ of mandamus v. John C. Clark et al., constituting the State Civil Service Commission of the State of New York. (Mandamus. Clerk in office of County Clerk, New York County. Petition granted.)
- Oct. 4. Supreme Court — New York County. The People of the State of New York ex rel. Johnston Export Publishing Company v. State Tax Commission of the State of New York. (Certiorari. To review determination of tax for 1918 and 1919. Pending.)

- Oct. 14. Supreme Court — Albany County. In the Matter of the Application of De La Vergne Machine Company for a certiorari addressed to the Tax Department of the State of New York. (Certiorari. To review tax assessment. Pending.)
14. Supreme Court — New York County. In the Matter of the Application of William H. Derevere v. William A. Prendergast et al. constituting the Public Service Commission of the State of New York. (Mandamus. For reinstatement as gas meter tester.)
17. Supreme Court — Albany County. In the Matter of the Petition of the National Automobile Mutual Casualty Company for a writ of certiorari directed to the Hon. Jesse S. Phillips as Superintendent of Insurance of the State of New York. (Certiorari. To review order directing Company to make good deficiency. Argued but not decided.)
21. Supreme Court — New York County. In the Matter of the Petition of Goldwyn Distributing Corporation for an order of certiorari to review a final determination of the Motion Picture Commission of the State of New York. (Certiorari. Rejection of motion picture film. "The Night Rose." Determination confirmed with costs and disbursements.)
26. Supreme Court — Kings County. In the Matter of the Application of Marc M. Fox for an Order of Mandamus against Henry D. Sayer, Industrial Commissioner. (Mandamus. Reinstatement as factory inspector. Motion denied.)
- Nov. 2. Supreme Court — New York County. In the Matter of the Application of John J. Curran for a mandamus order against State Tax Commissioners. (Reinstatement as investigator in Tax Department. Pending.)
3. U. S. District Court — Southern Dist. The Proctor & Gamble Company v. James A. Wendell, Ind., and as Comptroller of the State of New York, and Charles D. Newton, Ind., and as Attorney-General of the State of New York. (Tax Assessment. Pending.)

- Nov. 7. Supreme Court — Albany County. In the Matter of the Application Cigar Machinery Company for a writ of certiorari to review assessments made by the Commission for franchise taxes for years beginning November 1, 1918, based on business for the year ending Dec. 31, 1917. (Certiorari. To review franchise tax assessments. Pending.)
7. Supreme Court — Albany County. In the Matter of the Application of International Cigar Machinery Company for a writ of certiorari to review assessments made by the State Tax Commissioners of the State of New York for Franchise taxes for the year beginning November 1, 1921, based on business for the year ending Dec. 31, 1918. (Certiorari. To review tax assessments. Pending.)
14. Supreme Court — Westchester County. The People of the State of New York ex rel. Stephen J. Ferguson v. Lewis E. Lawes, Agent and Warden of State Prison at Ossining, N. Y. (Mandamus. Reinstatement as Prison Guard. Pending.)
21. Supreme Court — New York County. Sidney W. Brewster v. Leon C. Weinstock. (Libel. against defendant as State Commissioner of Prisons, based on report in Matter of Investigation of New York City Reformatory at New Hampton. Pending.)
28. Supreme Court — Queens County. In the Matter of the Application of Queens County Trust Company for an order directing the Superintendent of Banks of the State of New York to deliver the securities deposited under Sec. 184, Banking Law, to Queens County Trust Co., or American Trust Co., its successor in interest. (See title. Motion granted.)
- Dec. 7. Supreme Court — Albany County. The People of the State of New York ex rel. Vincent Astor v. State Tax Commission. (Certiorari. To review income tax determination. Pending.)
8. Supreme Court — Albany County. In the Matter of the Application of Frederick H. Cone & Company, Inc., for a writ of certiorari v. State Tax Commission of the State of New York. (Certiorari. To review determination of Nov. 15, 1921, under Article 9A. Pending.)

- Dec. 14. Supreme Court — Albany County. In the Matter of the Application of the Kings County Trust Company as an Executor of and under the last will and testament of William F. Armstrong, dec'd., for a certiorari order to the State Tax Commission. (Certiorari. To review income tax. Pending.)
17. Supreme Court — Albany County. In the Matter of the Application of George A. Fuller Company for a writ of certiorari to the State Tax Commission of the State of New York. (Certiorari. To review tax assessed under Article 9A. Pending.)

MISCELLANEOUS ACTIONS AND PROCEEDINGS COMMENCED DURING 1921

- Jan. 6. Supreme Court — Onondaga County. Rock Cut Stone Company v. Thomas P. B. Kennedy, Alex Zanello, Globe Indemnity Co., and People of the State of New York. (Lien. Highway Contract No. 1505. Discontinued.)
6. Supreme Court — Albany County. The People of the State of New York v. Benton Manufacturing Co. (Premium State Insurance Fund. Premium paid.)
6. Supreme Court — Albany County. The People of the State of New York v. E. P. Galer Company, Inc. (Premium State Insurance Fund.)
6. Supreme Court — Albany County. The People of the State of New York v. John E. Douglas Company, Inc. (Premium on State Insurance Fund. Premium paid.)
8. Supreme Court — Saratoga County. Elisa Ouimette v. Charles M. Ouimette. (Admeasurement of dower. Discontinued.)
8. Supreme Court — Albany County. The People of the State of New York v. Thomas Corr. (Premium on State Insurance Fund.)
8. Supreme Court — Albany County. The People of the State of New York v. Brooklyn Show Case Company, Inc. (Premium on State Insurance Fund.)
10. Supreme Court — Queens County. The People of the State of New York v. Point Breeze Realty Co., Inc., and John J. Schmidt. (To vacate letters patent.)

- Jan. 11. Supreme Court — Albany County. The People of the State of New York v. William F. Crockett. (Premium State Insurance Fund.)
13. The People of the State of New York ex rel. Frederick Hessel v. Charles Bernstein as Superintendent Rome State School. Habeas Corpus. Writ dismissed.)
14. Supreme Court — Kings County. In the Matter of the Petition of Willam Lohman, of 9320 Flatlands avenue, Brooklyn, N. Y. To register title to real property. (Judgment of registration granted.)
17. Federal Power Commission. In the Matter of the Niagara County Irrigation and Water Supply Company. Project No. 6. (License to divert water from Niagara River.)
17. Federal Power Commission. In the Matter of Application of Ford Motor Company. Project No. 13. (License to divert water from Niagara River.)
17. Federal Power Commission. In the Matter of the Application of Hydraulic Race Company. Project No. 15. (License to divert water from Niagara River.)
17. Federal Power Commission. In the Matter of Application of Louisville Power Corporation. Project No. 23. (License to divert water from Niagara River.)
17. Federal Power Commission. In the Matter of the Application of Niagara, Lockport & Ontario Power Co. Project No. 25. (License to divert water from Niagara River.)
17. Federal Power Commission. In the Matter of the Application of City of Buffalo. Project No. 26. (License to divert water from Niagara River.)
17. Federal Power Commission. In the Matter of the Application of T. Kennard Thompson and Peter A. Porter. Project No. 37. (License to divert water from Niagara River.)
17. Federal Power Commission. In the Matter of the Application of Millard F. Bowen, et al. Project No. 39. (License to divert water from Niagara River.)

- Jan. 17. Federal Power Commission. In the Matter of the Application of the Niagara Gorge Power Co. Project No. 45. (License to divert water from Niagara River.)
17. Supreme Court—Montgomery County. Carl G. Snyder v. State of New York, James Wendell as Comptroller. (Lien—Highway No. 512.)
17. Federal Power Commission. In the Matter of the Application of Western New York Utilities Co. Project No. 14. (License to divert water from Niagara River.)
18. Federal Power Commission. In the Matter of the Application of Lower Niagara River Power and Water Supply Co. Project No. 24. (License to divert water from Niagara River.)
18. United States District Court—Northern District of New York, The State of New York and Charles D. Newton, personally and as Attorney-General of the State of New York v. The United States and Edgar E. Clark, et al., constituting the Interstate Commerce Commission. (Rate of Railroad fare.)
19. Supreme Court—New York County. In the Matter of the Application of The Alumnae Association of the Presbyterian Hospital Training School for Nurses in the City of New York for authority to change its name. (Application granted.)
19. Federal Power Commission. In the Matter of the Application of Niagara Falls Power Company. Project No. 16. (License to divert water from Niagara River.)
20. Supreme Court—Bronx County. In the Matter of the Petition of Susan T. Baker of 585 East 165th Street, New York, to register title to real property. (Closed.)
20. Supreme Court—New York County. The People of the State of New York v. The Keepsafe Company, Inc. (Dissolution.)
22. Supreme Court—Westchester County. In the Matter of the Application of the Board of Education of Union Free School District No. 1 of the Town of

- Mamaroneck, Petitioner and Plaintiff to acquire title to lands. (Condemnation of lands.)
- Jan. 24. Supreme Court — New York County. In the Matter of the Application of Henry J. Schnitzer, private banker, for the return of certain securities deposited with the Superintendent of Banks of the State of New York. (Application granted.)
26. Supreme Court — New York County. The People of the State of New York v. Eugene Catenia and Luke McDermott. (Premium State Insurance Fund.)
27. Supreme Court — Kings County. The People of the State of New York ex rel. Tony Turtone v. E. S. Jennings, as Agent and Warden of Auburn Prison, et al. (Mandamus. To place relator's name on list for discharge. Petition dismissed.)
27. Supreme Court — Albany County. The People of the State of New York v. Ira S. Bushey & Sons. (Premium State Insurance Fund.)
28. Supreme Court — Richmond County. The People of the State of New York v. Edward W. Thompson and Arthur G. Thompson, Ind., and as Copartners of firm James Thompson & Sons; Barbara Thompson and Jean Thompson. (To revoke letters patent.)
28. Supreme Court — Westchester County. In the Matter of the Application of the Bronx Parkway Commission to acquire title to lands of Guaranty Trust Company as Executor of Katherine C. Ferris, et al. Proceeding No. 9. (Condemnation.)
31. Supreme Court — Westchester County. The People of the State of New York ex rel. Eliza Shellhoos v. the Superintendent of Letchworth Village, etc. (Habeas Corpus.)
31. Supreme Court — Albany County. The People of the State of New York v. Albert Rappeport. (Premium State Insurance Fund. Premium paid.)
- Feb. 1. Supreme Court — Albany County. The People of the State of New York v. Nicholas Luckner. (Premium State Insurance Fund.)
1. Supreme Court — Albany County. The People of the State of New York v. Peter Dennis. (Premium State Insurance Fund.)

- Feb. 2. Supreme Court — Albany County. The People of the State of New York v. August Hackenberg. (Premium State Insurance Fund.)
3. Supreme Court — Albany County. The People of the State of New York v. Charles Lindenblom. (Premium State Insurance Fund.)
4. Supreme Court — Richmond County. The People of the State of New York v. Atlantic Mutual Insurance Company and Merritt Clapman Derrick & Wrecking Co. (To revoke letters patent.)
7. Supreme Court — New York County. The People of the State of New York ex rel. Mitchell V. Maysan v. Agent and Warden of State Prison at Dannemora. (Habeas Corpus.)
8. Supreme Court — Albany County. The People of the State of New York v. William E. Hollingsworth. (Premium State Insurance Fund.)
- 15 Federal Power Commission. In the Matter of the Application of New York and Ontario Power Co. Project No. 147. (License to divert waters of Niagara River.)
16. Supreme Court — Cayuga County. The People of the State of New York ex rel. Frank Dunbar v. Edgar S. Jennings, Warden of Auburn Prison. (Habeas Corpus.)
16. Supreme Court — New York County. Marmon Automobile Company of New York v. S. Mayer, Inc., et al. (Sequestration.)
17. Supreme Court — Kings County. In the Matter of the Application of Home Title Insurance Co. of New York for authority to change its name to Home Title Insurance Co. (Change of name. Application granted.)
17. The People of the State of New York ex rel. James W. Roberts v. Lewis E. Lawes, Warden of Sing Sing Prison. (Habeas Corpus. Writ dismissed.)
22. Supreme Court — New York County. In the Matter of the Application of the Knickerbocker Hospital for leave to sell property.
23. Supreme Court — Queens County. In the Matter of the Application of the City of New York relative to acquiring title to real property required for

opening of North Jane Street, etc., in First Ward, Borough Queens, New York. Comptroller instructed to pay assessment included in final decree.)

- Feb. 23. U. S. District Court — Southern District of New York. In the Matter of A. J. Coccaro & Company, Bankrupt.
23. Supreme Court — Bronx County. The People of the State of New York v. Joseph Wenner, George Wenner et al., The Emigrant Industrial Savings Bank and the City of New York. (To revoke water grant.)
24. Supreme Court — Clinton County. The people of the State of New York ex rel. Ernest Menet v. Harry M. Kaiser as Agent and Warden of Dannemora State Prison. (Habeas Corpus. Writ dismissed.)
28. Supreme Court — Queens County. In the Matter of the Petition of Victor G. Luithlen, 709 Grand Street, Brooklyn, N. Y., to register title to real property.
28. Supreme Court — Bronx County. In the Matter of the Claim of Trinity Evangelical Lutheran Church, Inc., to register title to real property. (Judgment of registration granted.)
28. Supreme Court — Albany County. The People of the State of New York v. International Products Company. (Dissolution. Judgment of dissolution entered.)
- March 2. Supreme Court — Albany County. The People of the State of New York v. The Atlas Press, Inc. (Premium State Insurance Fund. Premium paid.)
2. District Court of United States District of New Jersey. In the Matter of the American Pottery Corporation, Bankrupt.
3. Supreme Court — Richmond County. The People of the State of New York v. New York Transit & Terminal Co., Ltd., The Staten Island Rapid Transit Railway Co., Thomas Williams et al. Action No. 1. (To revoke water grant.)
7. Supreme Court — Albany County. The People of the State of New York v. David F. Soden and William Soden. Premium State Insurance Fund.)

- March 8. Federal Power Commission. In the Matter of the Application of the Lockport Paper Co. Project No. 161. (License to divert water from Niagara River.)
9. Supreme Court — Cayuga County. The People of the State of New York ex rel. Edward E. Cizensky v. Edgar S. Jennings as Warden of Auburn Prison. (Mandamus.)
9. U. S. District Court — Southern District of New York. In the Matter of the Claim of the State of New York v. Marlboro Sand and Gravel Corporation et al. (Wharfage fees.)
10. Supreme Court — Richmond County. The People of the State of New York v. The Staten Island Railroad Company, The Staten Island Rapid Transit Railway Company, Guaranty Trust Company of New York and Bankers Trust Company. (To revoke water grant.) Three actions.
12. Supreme Court — Kings County. In the Matter of the Application of Amelia A. Scheidt as executrix, etc., for return of securities deposited by John S. Scheidt, deceased, as private banker, with the Superintendent of Banks of the State of New York. (Judgment entered directing return of securities.)
12. Supreme Court — Albany County. John W. Grenon, an Infant, by James McGovern, his guardian ad litem v. Eugene Chester Roberts, Jr. (Assault by State Trooper.)
15. Supreme Court — Cayuga County. The People of the State of New York ex rel. George Loeffler v. Edgar S. Jennings as Warden of Auburn Prison. (Habeas Corpus.)
22. Supreme Court — Albany County. Watson Contracting Company v. Elmer J. Latus and Michael J. Hawkins as Latus and Hawkins and The People of the State of New York. (Lien Highway No. 5643.)
26. Supreme Court — Albany County. The People of the State of New York v. Jamestown Iron & Metal Company, Inc. (Premium State Insurance Fund. Premium paid.)
31. Supreme Court — New York County. James A. Wendell as Comptroller v. James B. Powers et al.

Two actions. (Foreclosure of U. S. Deposit Fund Mortgages 1047 and 1048.)

- April 2. Supreme Court — Wayne County. The People of the State of New York ex rel. Nicholas A. De John v. Frederick E. Lyth. (Quo Warranto. Village Trustee, Lyons.)
4. Supreme Court — New York County. In the Matter of the Voluntary Dissolution of Kelley, Drayton & Co., Credit Union. (To close business.)
4. Supreme Court — Richmond County. In the Matter of the Petition of John Rooney of 72 Pleasant Valley Avenue, Stapleton, to register title to real property.
7. Supreme Court — New York County. In the Matter of the Guardian Personal Loan Co., Inc., to close its affairs. (No objections.)
7. Supreme Court — New York County. In the Matter of the Application of Parker Supply Company to file its certificate of incorporation in the office of the County Clerk of New York County. (Order entered granting leave to file certificate.)
7. Supreme Court — New York County. In the Matter of the American Female Guardian and Home for the Friendless. (To sell property.)
9. Supreme Court — Kings County. In the Matter of the Petition of J. Lehrenkrauss' Sons, Inc., to amend certificate of incorporation. (Amend certificate.)
12. Supreme Court — Bronx County. In the Matter of the Petition of George Huskinson of 293 Van Horne Street, Jersey City, N. J., to register title to real property.
13. Supreme Court — Westchester County. In the Matter of the Application of the Slavish Evangelical Holy Trinity Church of Yonkers for authority to change its name to the Slovak Evangelical Congregation of the Augsburg Confession. Order entered granting change of name.)
13. Supreme Court — Westchester County. In the Matter of the Petition of the Slavish Evangelical Holy Trinity Church of Yonkers to amend its certificate of incorporation. (Order entered granting amending of certificate.)

- April 23. Supreme Court — New York County. In the Matter of the Petition of Vacation Association, Inc., to amend its certificate of incorporation. (Motion denied.)
25. Supreme Court — New York County. In the Matter of the amendment of the certificate of incorporation of M. & H. Strumsky, Inc. (Amend certificate. Application withdrawn.)
26. Supreme Court — Cayuga County. The People of the State of New York ex rel. W. Thorpe v. Edgar S. Jennings, Warden of Auburn Prison. (Habeas Corpus.)
27. Supreme Court — New York County. In the Matter of the Petition of Joseph Kraus of 55 East 76th Street, New York, to register title to real property, (Judgment of registration granted.)
27. Supreme Court — New York County. In the Matter of the Petition of John J. Hopper of 352 West 121st street, New York City, to register title to real property. (Judgment of registration granted.)
27. Supreme Court — Clinton County. The People of the State of New York ex rel. Ernest G. Sofio v. John R. Ross as Superintendent of New York State Hospital for Criminal Insane at Dannemora. (Habeas Corpus.)
30. Supreme Court — New York County. In the Matter of the Application of Moses Samuels for a dissolution of Kosmolite Manufacturing Co. (Dissolution.)
- May 2. District Court of U. S., Southern District of New York. In the Matter of the Application of Alien Property Custodian for instructions as to disposition of property formerly owned by International Re-Insurance, Ltd., now on deposit with State Superintendent of Insurance.
2. Supreme Court — Bronx County. In the Matter of the Petition of Foundation Realty Co., Inc., of 299 Broadway, New York City, to register title to real property. (Judgment of registration granted.)
5. Supreme Court — Westchester County. Albert J. Loddell et al. as substituted trustees under last will

- of *Cornelia Stoors v. Albert J. Lobdell as Supervisor, etc., Charles D. Newton as Attorney-General, Frank B. Gilbert as Acting Commissioner of Education et al.* (Construction of will.)
- May 5. Supreme Court — Queens County. In the Matter of the Petition of Max Bruchsaler of 273 Grand Avenue, Long Island City, to register title to real property. (Judgment of registration entered.)
5. Supreme Court — Queens County. In the Matter of the Petition of William B. Rea of Little Neck, to register title to real property.
6. Supreme Court — Albany County. *The People of the State of New York v. Charles P. McArdle.* (Payment for waste paper.)
10. Supreme Court — Kings County. *The People of the State of New York ex rel. Edward R. Domschke v. Lawrence Messenger.* (Quo Warranto. Assistant Clerk, Municipal Court of City of New York.)
10. Supreme Court — New York County. *Alice A. Reed Deeves v. James Edwin Pratt Deeves et al.* (Admeasurement of dower.)
11. District Court of the U. S. — Northern District of New York. *The State of New York and James A. Wendell as Comptroller of the State of New York v. The Saranac Land & Timber Co.* (Injunction. Title to lands in Adirondacks.)
12. Supreme Court — New York County. *Nannie Morae Ryan v. Central Union Trust Co. et al.* (Admeasurement of dower.)
17. Supreme Court — Queens County. In the Matter of the Petition of *Cornelia C. Rapelji*, of 281 Lincoln Street, Flushing N. Y., to register title to real property.
18. Supreme Court — Queens County. In the Matter of the Application of *Mary A. Mills*, of 250 Harris Avenue, Long Island City, to register title to real property.
- Supreme Court — Erie County. *The People of the State of New York v. The Century Manufacturing Company.* (Dissolution. Judgment entered granting dissolution.)

- May 20. Supreme Court. — Westchester County. Margaret Kirby v. Christian Lyke et al. (To clear title.)
23. U. S. District Court — Northern District of New York. Pittsburg A. Shawmut Coal Co., Title Guarantee & Trust Co., and J. J. Jermyn v. Delaware and Northern Railroad Co. (To close business.)
23. District Court of the U. S. — Southern District of New York. In the Matter of the Pawling Transportation Corporation. Bankrupt. (Wharfage charge.)
25. Supreme Court — Kings County. In the Matter of the Petition of Sylvia Grossman of 1001 Third Avenue, New York, to register title to real property. (See title.)
26. Supreme Court — Erie County. In the Matter of the Application of Clifton Specialty Co., Inc., for authority to change its name to Clifton-Connor Corporation. (Change name.)
27. Supreme Court — Livingston County. George W. Beck v. Town of Avon and Erie Railroad Company. (Damages for personal injury, Five Arch Bridge across Conesus Lake.)
28. Supreme Court — Kings County. Max Rothbart v. Dulciphone Shops, Inc., et al. (Receivership.)
28. Supreme Court — New York County. In the Matter of the Application of Joseph P. Grace, etc., to revive and extend corporate existence of Great Neck Dock Co.
31. Supreme Court — Kings County. In the Matter of the Petition of Ethel Smith Dorrance of 14 West 28th Street, New York City to register title to real property. (See title.)
31. Interstate Commerce Commission. In the Matter of the rates, fares and charges of the New York Central Railroad Company and other Railroad Companies in the State of New York. (Rehearing relative to Fonda, Johnstown and Gloversville Railroad.) Docket 11623.
- June 2. Court of Appeals. The People of the State of New York v. Clarence L. Fisher and Florence Fisher Jackson. (Title to land.)

- June 4. Supreme Court — New York County. In the Matter of the Petition of Thomas J. Torpy, Inc., to amend certificate of incorporation. (Motion dismissed.)
4. Supreme Court — Kings County. Charles Wirtz et al v. Henry Michaels et al. (To reform deed.)
4. Supreme Court — Kings County. In the Matter of the Petition of Lester M. Hunkele to register title to real property.
- July 2. Supreme Court — Clinton County. People of the State of New York ex rel. William Thorpe v. Harry M. Kaiser, Warden of Clinton Prison. (Habeas Corpus.)
7. Supreme Court — Queens County. In the Matter of the Petition of Barbara Hertel of 137 Jackson Avenue, Long Island City, to register title to real property.
7. Supreme Court — Queens County. In the Matter of the Petition of Nicola Fischette et al of 69 Seventh Avenue, Long Island City, to register title to real property.
9. Supreme Court — Richmond County. In the Matter of the Petition of Anna M. King of 1 Valley Street, Arrochar, Staten Island, to register title to real property.
11. Supreme Court — Erie County. Harry H. Hoffman v. Bernard Heflot and George P. Thomas, Jr. (Malicious persecution in prosecuting violation of Motor Law.)
13. Supreme Court — Kings County. In the Matter of the Application of Carl F. Gamer of 10126 South Vine Street, Richmond Hill, to register title to real property.
13. Supreme Court — Bronx County. In the Matter of the Petition of Arthur H. Murphy of 1800 Arthur Avenue, New York City, to register title to real property.
13. Supreme Court — Bronx County. In the Matter of the Claim of Joseph Ventiniglia of 104 West 169th Street, New York City, to register title to real property.
13. Supreme Court — New York County. In the Matter of the Foreign Trade Banking Corporation. (To

close business. Order entered declaring business closed.)

- July 14. Supreme Court — Albany County. The People of the State of New York v. Edward Ewing. (Violation of Public Health Law. Sale of Asparin. Pending.)
19. Supreme Court — Chautauqua County. In the Matter of the Application of the Overland Jamestown Company, Inc., to change its name to the Peterson-Henderson Co., Inc.
20. U. S. District Court — Southern District of New York. In the Matter of the Application of Thomas W. Miller as Alien Property Custodian for instructions as to property of Hamburg Bremen Fire Insurance Co. now on deposit with State Insurance Department. (Order granted directing Superintendent of Insurance to turn over property to Alien Property Custodian.)
20. Supreme Court — Cayuga County. In the Matter of the Application of the Town of Conquest for a writ of mandamus against Frank A. Eldredge requiring him to pay over certain moneys in his hands as County Treasurer of Cayuga County. (Mandamus. Discontinued by agreement to pay \$1,550.)
20. U. S. District Court — Southern District of New York. In the Matter of the Application of Thomas W. Miller, as Alien Property Custodian, etc., for instructions as to proper disposition of property of Swiss National Ins. Co. Ltd., of Basle, Switzerland. Order granted directing Superintendent of Insurance to deliver property to Alien Property Custodian.)
26. Supreme Court — Queens County. In the Matter of the Petition of Frank Sluka of 268 Pleasure Place, Astoria. to register title to real property.
28. Clisby v. Coughlan & Beyer, etc. (Application for Receiver.)
- Aug. 2. Supreme Court — New York County. In the Matter of the Petition of Cecilia Morrill, et al., of 358 West 56th Street, New York City, to register title to real property.

- Aug. 5. Supreme Court — Cayuga County. The People of the State of New York ex rel. James Thompson (alias John Ramson) v. Edgar L. Jennings, Warden of Auburn State Prison. (Habeas Corpus.)
16. Supreme Court — Clinton County. The People of the State of New York ex rel. Frederick J. Hose v. Harry M. Kaiser, Warden of Clinton Prison. (Habeas Corpus.)
17. U. S. District Court. Southern District of New York. In the Matter of Edward J. Barton Lighterage Company, Bankrupt. (Wharfage fee.)
25. Supreme Court — New York County. Dinke Brook v. Shifra Rachman et al. (Admeasurement of Dower.)
26. Supreme Court — Albany County. The People of the State of New York v. Irving Goldstein, Jr. (Premium State Insurance Fund. Pending.)
29. Supreme Court — Bronx County. In the Matter of the Petition of August Kroepka of 2261 Powell Avenue, New York City, to register title to real property.
29. Supreme Court — In the Matter of the Petition of Margaret M. Graner, of 650 St. Anne Avenue, New York, to register title to real property.
29. Supreme Court — In the Matter of the Petition of Margaret M. Graner, of 650 St. Ann Avenue, New York, to register title to real property. (Pending.)
31. Supreme Court — Steuben County. James Elgar v. Warren-Moore & Co.; New Amsterdam Casualty Co. and State of New York. (Lien. Three buildings for Utica State Hospital, Marcy Division. Pending.)
31. Supreme Court — Bronx County. In the Matter of the Petition of Manuel B. Berkowitz, of 460 Grant Street, New York City, to register title to real property. (Judgment of registration granted.)
31. Supreme Court — Bronx County. In the Matter of the Petition of Catherine Meighan, of 3000 Third Avenue, New York City, to register title to real property. (Pending.)

- Sept. 2. Supreme Court — Albany County. In the Matter of the Application of the Albany City Savings Institution for authority to change its name to Albany City Savings Bank. (Change name.)
7. Supreme Court — New York County. In the Matter of the Application of Gilbert A. Robertson Home, etc., for leave to sell its real property. (Pending.)
9. Supreme Court — New York County. In the Matter of the Proposed amendment of the certificate of incorporation of Sheridan Theatre Co., Inc. (See title. Order amending certificate resettled.)
10. Supreme Court — St. Lawrence County. Joseph P. La Rue v. Mortimer J. Burger. (Alleged assault by State Trooper. Pending.)
13. Supreme Court — Bronx County. The People of the State of New York v. Robert Sterling Clark and Francine J. M. Clark. (To vacate letters patent. Pending.)
14. Supreme Court — Richmond County. In the Matter of the Petition of Charles Kuttruff, of 334 Mosel Avenue, Stapleton, to register title to real property. (Pending.)
14. Supreme Court — Kings County. In the Matter of the Petition of Jennie L. Conway and Annie Flanagan, of 179 McDonough Street, Brooklyn, to register title to real property. (Judgment of registration granted.)
15. Supreme Court — Bronx County. In the Matter of the Application of William Eckenfelder, of 1217 Shakespeare Avenue, New York City, to register title to real property. (Pending.)
15. Supreme Court — Bronx County. In the Matter of the Application of Emily C. Ross, of 2182 Lexington Avenue, New York City, to register title to real property. (Pending.)
17. Supreme Court — New York County. In the Matter of the Application of G. Hilmar Lundbeck as private banker under the name of Nielsen & Lundbeck, for the return of securities deposited with the Superintendent of Banks, etc. (Application granted for return of securities.)

- Sept. 19. Supreme Court — Washington County. The People of the State of New York ex rel. The Sandy Hill National Bank of Hudson Falls v. M. D. Vaughan, et al., as Assessors of the Town of Kingsbury. (Certiorari to review assessment of tax on capital, surplus, etc., of bank. Pending.)
21. Supreme Court — Cayuga County. The People of the State of New York ex rel. George Jimerson v. Edgar S. Jennings, Warden of Auburn Prison.
22. Supreme Court — Queens County. In the Matter of the Petition of Kate Eckhoff, of 18 West 20th Street, Whitestone, to register title to real property. (Pending.)
22. Supreme Court — Queens County. In the Matter of the Petition of Matthew A. Murray et al., of 26 West 22nd Street, Whitestone, to register title to real property. (Pending.)
23. Supreme Court — New York County. Lewis R. Rose v. The People of the State of New York; General Electric Company; Edward Otten et al. as Trustee in Bankruptcy of Adams, Britz & Co., Bankrupt. (Lien. Contract No. 6408, Heating Plant, Brooklyn State Hospital. Pending.)
26. Supreme Court — Queens County. In the Matter of the Petition of John K. Lundy, of 253 Nott Avenue, Long Island City, New York, to register title to real property. (Pending.)
26. Supreme Court — Queens County. In the Matter of the Petition of Elizabeth Clancy, of 130 12th Street, Long Island City, to register title to real property. (Pending.)
26. Supreme Court — Queens County. In the Matter of the Petition of Morris Del Aquila, of 35 Purvis Street, Long Island City, to register title to real property. (Pending.)
28. Supreme Court — Queens County. In the Matter of the Petition of Martha Haefelin et al, of 802 Eighth Avenue, New York City, to register title to real property. (Pending.)
28. Supreme Court — Queens County. In the Matter of the Petition of Ernest W. Johnson et al. of 85 Dean Street, Brooklyn, to register title to real property. (Pending.)

- Sept. 28. U. S. District Court — Southern District of New York. In the Matter of Cullen Barge Corporation, Bankrupt. (Claim for franchise taxes. Pending.)
- Oct. 1. Supreme Court — Kings County. Kate Schafer v. Joseph F. Schafer et al. (Admeasurement of dower. Pending.)
1. Supreme Court — New York County. The Hudwick Corporation v. Bertram Mitchell et al. (To clear title. Pending.)
8. Supreme Court — New York County. In the Matter of the Dissolution of the Commonwealth Trust Company of New York. (To close business. No objections.)
10. Supreme Court — Queens County. In the Matter of the Petition of Charles Lauda, Sr., of College Point, New York, to register title to real property. (Pending.)
13. Supreme Court — Kings County. In the Matter of the Petition of Nathan W. Stanley of 652 Madison Street, Brooklyn, to register title to real property. (Pending.)
14. Supreme Court — New York County. Mary E. Myers v. Maria Moss et al. (Admeasurement of dower. Pending.)
21. Supreme Court — New York County. In the Matter of the Application of Roy T. Parker for a mandamus order v. William F. Schneider as Clerk of the County of New York. (Mandamus to compel County Clerk to file certificate. Order for writ granted.)
21. Supreme Court — Erie County. The People of the State of New York v. John Doe et al. unknown claimants or heirs of Thomas W. Cox, deceased, et al. (Escheat. Pending.)
25. Supreme Court — New York County. The People of the State of New York ex rel. Albert C. Pulver (alias Charles Klein) v. Lewis E. Lawes as Agent and Warden of Sing Sing Prison. (Habeas Corpus. Pending.)
27. Supreme Court — Monroe County. The People of the State of New York v. Milford E. Goodwin. (Violation of the Dental Law. Settlement made. Discontinued.)

- Oct. 31. Public Service Commission. In the Matter of the Petition of the State Highway Commission, etc., that a grade crossing of Erie Railroad and County Highway No. 834. Town of Kirkwood, Broome County, be eliminated (Case No. 7149), Erie Railroad Co., Appellant; State Highway Commission et al., Respondent. Newberry Crossing. (Pending.)
- Nov. 2. Supreme Court — Orange County. In the Matter of the Application of George D. Valentine et al. for an order directing the restoration of their daughter, Harriet Valentine, now in custody of New York Training School for Girls at Hudson, N. Y.
7. Supreme Court — Albany County. The People of the State of New York v. National Grain Co., Inc. (Dissolution. Judgment granted dissolving corporation.)
7. U. S. District Court — Southern District. In the Matter of Victor S. Fox & Co., Inc. (Franchise tax. Pending.)
9. Supreme Court — Schenectady County. Max Fein v. E. R. Cronk. (Injury by motorcycle ridden by State Trooper. Pending.)
10. Supreme Court — Clinton County. The People of the State of New York ex rel. Robert Carson v. Harry M. Kaiser, Warden of Clinton Prison. (Habeas Corpus. Pending.)
14. Supreme Court — New York County. The People of the State of New York ex rel. The Hanover National Bank of the City of New York v. Henry M. Goldfogle, President, etc., constituting the Board of Taxes and Assessments of the City of New York. (Certiorari. Taxation of bank stock. Pending.)
17. Supreme Court — New York County. George H. D. Foster v. The Tesla Company. (Appointment of receiver. Pending.)
19. Supreme Court — New York County. In the Matter of the Application of A-1 Building Corporation to revive its corporate existence. (Pending.)
21. Supreme Court — New York County. The People of the State of New York v. Murray Hulbert. Garbage Dump, Canal Terminal, foot of West 52nd Street, New York City. (To abate nuisance. Pending.)

- Nov. 25. U. S. District Court — Southern District. *Trumbour Whitehead Brass & Copper Co., Ins. v. Machinery and Metal Sales Co., Inc., et al.* (Franchise tax. Pending.)
25. Supreme Court — Bronx County. In the Matter of the Petition of Joseph Paproeki of 851 Morris Avenue, New York City, to register title to real property. (Pending.)
28. Supreme Court — New York County. In the Matter of the Petition of the Universal Negro Improvement Association, Inc., to amend its certificate of incorporation. (Motion denied without prejudice to renewal upon proper papers.)
30. Supreme Court — New York County. *Marion I. Walton v. Alice Walton et al.* (To compel performance of contract and secure title. Pending.)
30. Supreme Court — Kings County. In the Matter of the Petition of John Bamberger of 6730 Ridge Boulevard, Brooklyn, to register title to real property. (Pending.)
- Dec. 1. Supreme Court — Orange County. *The People of the State of New York ex rel. Margaret Ballard v. The Keeper of the New York State Reformatory for Women at Bedford.* (Habeas Corpus. Pending.)
- Dec. 1. Supreme Court — New York County. *The People of the State of New York ex rel. Charles E. O'Toole v. Henry D. Sayer as Industrial Commissioner.* (Mandamus. Reinstatement as Superintendent in Bureau of Employment. Motion denied without costs.)
2. Supreme Court — Nassau County. In the Matter of the Petition of Fredericka Schmidt of North Third Street, Great Neck, N. Y. (Register title to real property. Pending.)
5. Supreme Court — Bronx County. In the Matter of the Application of the James Cauldwell Association, Inc., to change its name to the Rosebud Athletic & Social Club, Inc. (Change of name. Pending.)
5. Supreme Court — Wayne County. *Frank O. Richardson v. Newton E. Dusenbery, William J.*

- George and John J. Corrigan. (Assault by State Trooper. Pending.)
- Dec 6. Supreme Court — Kings County. The People of the State of New York ex rel. Helen G. Mellor v. Mary Hinkley as Superintendent of New York Training School for Girls at Hudson. (Habeas Corpus. Pending.)
7. Supreme Court — Kings County. Wilfred Stewart v. Florence L. Kay et al. (To quiet title. Pending.)
7. Supreme Court — Washington County. The People of the State of New York ex rel. Minnie Hicks v. Charles Bernstein, Superintendent of Rome State School. (Habeas Corpus. Pending.)
7. Supreme Court — Richmond County. In the Matter of the Petition of Robert H. Benary, of 302 Westervelt Avenue, New York City, to register title to real property. (Pending.)
8. Supreme Court — Westchester County. People ex rel. Michael J. Delahunty v. Lewis E. Lawes, as Superintendent of Sing Sing Prison. (Habeas Corpus. Pending.)
9. Supreme Court — Monroe County. The People of the State of New York ex rel. Thomas Salato v. the Superintendent of the State Agricultural and Industrial School at Industry, New York. (Habeas Corpus. Pending.)
9. Supreme Court — Bronx County. In the Matter of the Application of Isidor Hammerschlag, of 189 Harrison Avenue, Brooklyn, to register title to real property. (Register title to real property. Pending.)
9. Supreme Court — Bronx County. In the Matter of the Application of Marie Hengen, of 934 East 179th Street, New York City, to register title to real property. (Pending.)
10. Supreme Court — Genesee County. LeRoy Lime and Crushed Stone Corporation v. The State of New York; Fred C. Rogers Steuben Trust Co., General Crushed Stone Co., Atlantic Construction Co. and Edison Portland Cement Company. (Lien. Contract No. 5593-A, Highway No. 5021. Pending.)

- Dec. 12. Supreme Court — Erie County. The People of the State of New York v. John Doe et al., unknown heirs of Gertrude Struebel. (Escheat. Pending.)
13. Supreme Court — Ontario County. In the Matter of the Application of the Trustees of the Parochial Fund of the Protestant Episcopal Church of the Diocese of Western New York for directions as to the disposition of a certain trust fund under the Will of Martha A. DeLancey, late of Geneva, New York, deceased. (Pending.)
14. Supreme Court — New York County. In the Matter of the Application of Edward A. Devins and thirteen others for a mandamus order against Henry D. Sayer, Industrial Commissioner of the State of New York, (Mandamus-Reinstatement. Pending.)
22. Interstate Commerce Commission. In the Matter of the Complaint of the Conservation Commission of the State of New York v. American Railway Express Company; as to rates (interstate) on reforesting tree stock. (Pending.)

ACTIONS COMMENCED IN 1921 INVOLVING MATTERS IN RELATION TO THE CONSERVATION LAW

EJECTMENT ACTIONS

The People v. Ralph Page & Ano. (Fulton County). At issue.

The People v. Mary Winters & Ano. (Fulton County). At issue.

The People v. Mrs. Sarah A. Rogers (Franklin County). Judgment for Defendant.

The People v. Eugene Morse (Delaware County). At issue.

The People v. George H. Carlin (Hamilton County). At issue.

The People v. Roberta Gillman & Ano. (Ulster County). At issue.

TRESPASS ACTIONS

The People v. William H. Gay (Fulton County). At issue.

TOP-LOPPING ACTIONS

The People v. Fred Perkins (Essex County). Settled for \$20.

The People v. Albert Stickney (Franklin County). At issue.

ACTIONS FOR BREACH OF WARRANTY

The People v. George N. Ostrander (Saratoga County). At issue.

The People v. John W. Olmstead (Fulton County). At issue.

ACTIONS FOR PARTITION OF REAL ESTATE

Finch, Pruyn & Co., Inc. v. Wm. H. Faxon et al. & The People (Essex County). At issue.

Frank L. Bell v. Theron Smith et al. & The People (Hamilton County). At issue.

ACTION TO RECOVER BALANCE DUE FOR ROYALTIES, ETC., AT
SARATOGA RESERVATION

The People v. Saratoga State Waters Corporation (Albany County). At issue.

ACTIONS FOR FISH AND GAME VIOLATIONS

The People v. J. Griffin Green et al. (Franklin County). Settled for \$50.

The People v. Matthew Monahan et al. (Franklin County). Settled for \$50.

The People v. Bernard Hennessey (Hamilton County). Settled for \$50.

The People v. Carl Schmoker (Yates County). Judgment for Defendant.

The People v. William Wright (Herkimer County). At issue.

The People v. George Lawson (Herkimer County). At issue.

The People v. James Lawson (Herkimer County). At issue.

The People v. Edward Wright (Herkimer County). At issue.

APPLICATIONS TO THE ATTORNEY-GENERAL TO
COMMENCE ACTIONS IN THE NAME OF THE
PEOPLE, 1921

PENDING FROM 1920

Application of Anthony Wisnieski and John L. Mikuszewski for commencement of an action for dissolution of Polish Union of America, a corporation.

Application pending.

Application of Amelia Solomon for accounting and dissolution of Universal Electric Welding Company.

Application denied on ground that no public interest is involved.

NEW APPLICATIONS

- Feb. 6. In re American Lettish Commercial League.
Matter dropped by Petitioner after filing of petition.
6. Application of Charles H. Buck for dissolution of New York Safety Chest Company. Matter dropped by Applicant after filing petition.
24. Application of Lou B. Cleveland for dissolution of Syracuse & Suburban Railroad Company.
Application denied, on ground that the insolvency of the respondent was not established, and that the petitioner has an adequate remedy to protect his interests as a mortgage bondholder.
26. Application of John McLennan for dissolution of Syracuse & Suburban Railroad Company.
Matter dropped by Applicant after filing of petition.
- March 10. Application of Emanuel Zimmet and Morris J. Garahelis to dissolve the Electric Trading Company, Inc.
Application granted.
19. Application of Nicholas A. de John to test title of Frank E. Lytle to office of Trustee of the Village of Lyons.
Application granted.
23. Application of Edward R. Domschke for action to test title to office of Assistant Clerk of Municipal Court of Brooklyn.
Application granted.
- April 6. Application of City of New York to annul franchises of Pelham Park & City Island Ry. Co., Inc.
Application pending.
6. Application of City of New York to annul franchises of Mid-Crosstown R. R. Co., Inc.
Application pending.
11. Application of William L. Howland, for dissolution of Century Manufacturing Company.
Application Granted.
- July 9. In re Wadick Realty Company.
Application pending.

- July 10. In re National Grain Company, Inc.
Application Granted.
16. Application of Mary Alice Lysaght for action to dissolve Ironbound Realty Corporation.
Application pending.
23. Application of Robert Walker for action to test title of Reginald W. Pressprich to the office of Trustee of Village of Rye.
Application denied, on ground sufficient facts not shown.
- Oct. 8. Re O. L. Forester Agency, Inc.
Application denied, on ground insufficient facts shown and no public interest involved.
- Dec. 17. Application of J. Royal Kinney for dissolution of Kinney Manufacturing Company.
Application granted.
24. Application of Ida Hauser for dissolution of Hauser Machine & Manufacturing Company.
Application pending.

Opinions in above matters will be found in the latter part of this book with the formal opinions.

Formal Opinions
of the
ATTORNEY-GENERAL

[59]

OPINIONS

SALARIES OF LABORERS, WORKMEN OR MECHANICS IN THE SERVICE OF A BOARD OF EDUCATION — LABOR LAW, SECTION 3 — EDUCATION LAW, SECTION 887.

Section 3 of the Labor Law has no application in fixing annual salaries of laborers, workmen or mechanics in the employ of a board of education.

INQUIRY.

Yearly salaries have been established for carpenters, painters, plumbers and laborers by the board of education of the city of Utica. Will you please inform me if this practice is a violation of Section 3 of the Labor Law?

OPINION

It appears from a report made by H. B. Whitney, Confidential Agent of the State Industrial Commission, that prior to January 1st, 1921, the board of education of the city of Utica was employing one plumber at \$7.09 per day; four carpenters at \$5.60 per day; two painters at \$7.28 per day and three laborers at \$3.50 per day; that such board of education had always paid the prevailing per diem rate of wages to such employees until the past summer when the prevailing rates were twice increased and there were not sufficient funds available to meet the demands.

The report of said confidential agent further shows that on the 29th day of October, 1920, such board of education of the city of Utica met to consider the budget for 1921, and finally adopted a resolution establishing in said budget for 1921 certain positions with certain fixed salaries as follows: plumber and steam-fitter at \$2,000 per year; four carpenters at \$1,700 per year; two painters at \$1,650 per year; three laborers at \$1,000 per year together with two weeks vacation during the year without loss of pay.

It further appears from the report of said confidential agent that the prevailing rate of wages in the city of Utica at the present time of the employees or mechanics performing the same class of work as those for whom the above mentioned positions were created by the board of education is as follows: plumbers and carpenters, \$1.00 per hour; painters, 91 cents per hour; laborers, 65 cents per hour, and it is contended that the salaries for the positions so created, if considered from a per diem basis, would be less than the now prevailing rate of wages for such class of work in the city of Utica.

The question has been raised by the State Industrial Commission as to whether or not the payment of these classes of employees and mechanics under the method adopted by the board of education of the city of Utica is in violation of section 3 of the Labor Law, which is as follows:

"Eight hours shall constitute a legal day's work for all classes of employees in this state except those engaged in farm and domestic service unless otherwise provided by law. This section does not prevent an agreement for over work at an increased compensation except upon work by or for the state or a municipal corporation, or by contractors or subcontractors therewith. Each contract to which the state or a municipal corporation or a commission appointed pursuant to law is a party which may involve the employment of laborers, workmen, or mechanics shall contain a stipulation that no laborer, workman or mechanic in the employ of the contractor, subcontractor or other person doing or contracting to do the whole or a part of the work contemplated by the contract shall be permitted or required to work more than eight hours in any one calendar day except in cases of extraordinary emergency caused by fire, flood or danger to life or property. *The wages to be paid for a legal day's work as hereinbefore defined to all classes of such laborers, workmen or mechanics upon all such public works, or upon any material to be used upon or in connection therewith shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work, on, about, or in connection with which such labor performed in its final or completed form is to be situated, erected or used.*"

With respect to the portion of the section above quoted, which relates to the prevailing rate of wages, it applies only to such work for which a contract or agreement is made with the employee on a per diem compensation; that is the compensation for

"a legal day's work * * * shall not be less than the prevailing rate for a day's work."

The courts have held that a man holding yearly employment at a fixed salary or compensation is not within the intent of the prevailing rate of wages provision, because he

"is not brought into competition with workmen seeking daily or weekly employment, so that he is clearly not within the reason or purposes of the law, which in consequence, does not apply."

Bock v. City of New York, 31 Misc. 56.

Also, *In re Farrell v. Board of Education*, 113 App. Div., 406, Justice Jenks writing the opinion, in construing section 3 of the Labor Law holds that an employee or mechanic working under an annual salary does not come within the provisions of said section, wherein he states:

"But the language of the Labor Law indicates that it refers to those who are paid daily wages for labor upon public work, and that its purpose is to require that such wages shall equal the prevailing rate paid to other laborers, workmen or mechanics, not engaged upon public work."

We also find that it was the intent of the Legislature that said section 3 of the Labor Law should not apply to a person receiving an annual salary or compensation; but only to those paid under the daily wage method, for the reason that this section of the law applies to the state service equally with the city service, and yet the Legislature has for some time past, under the annual appropriation bill, fixed the compensation of hundreds of laborers, workmen and mechanics on an annual salary basis, which in no way corresponds to the prevailing rate of wages in the community in which these men are located and employed.

Therefore, the only question left for me to review is whether or not the board of education of the city of Utica had the statutory authority to employ the persons hereinabove enumerated upon an annual salary basis.

I find that such acts of the board of education of the city of Utica are authorized and validated under section 887 of the Education Law, as amended by chapter 645 of the Laws of 1919, which empowers the board of education in each city.

"to fix the salary and annual salary increment of all members of supervising and teaching staffs and of all principals, teachers, supervisors or other *employees*, whose salaries are not fixed by the provisions of this act."

It is perfectly apparent that the acts of the board of education of the city of Utica in fixing annual salaries to these positions are valid; that the persons occupying such positions in no way interfere with or compete with other persons in the city of Utica performing similar work under a daily wage; that in addition to their annual salary such persons are permitted a vacation of two weeks with full pay.

From all the reasons, as above set forth, I can reach no other conclusion than to hold that the acts and proceedings of said board of education of the city of Utica, relative to the employment of the persons herein mentioned, are in no respect a violation of section 3 of the Labor Law.

Dated, January 13, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO HON. JAMES M. LYNCH,
*Commissioner, State Industrial Commission,
Albany, N. Y.*

CIVIL SERVICE LAW SECTIONS 9 AND 22 — RULE 12, PARAGRAPH 1,
PROBATIONARY APPOINTMENTS.

Under section 9 of the Civil Service Law, all appointments in the classified service (which includes competitive, non-competitive and exempt classes) must be for probationary terms not exceeding the time fixed in the rules. The rules fix no probationary terms for positions in the exempt class. Where the rule is silent and the probationary term was not fixed by the appointing officer at the time of making an appointment, it may be fixed thereafter.

Section 22 of the Civil Service Law does not require the retention of veterans (except Civil War Veterans) after the expiration of a probationary term and no hearing is necessary before they may be dropped.

INQUIRY

Shortly before January 1, 1921, the Superintendent of Public Buildings appointed certain veterans of the World War to positions as laborers in the Department of Public Buildings. The term of office of the Superintendent of Public Buildings expired and the new superintendent was appointed on January 1, 1921. The outgoing superintendent did not fix any probationary terms for the laborers so appointed. May their probationary terms be fixed by the new superintendent? What are their rights under section 22 of the Civil Service Law as amended by chapter 833 of the Laws of 1920?

OPINION

The first Civil Service Law enacted in this State was passed in 1883. The first Civil Service Commission was appointed by Governor Cleveland in the same year. And among the first rules it promulgated (approved by the Governor December 6, 1883) was one reading as follows:

“Rule XL.

“Every original appointment or employment in the civil service shall be for a probationary term of three months, at the end of which time, if the conduct and capacity of the person appointed or employed shall have been satisfactory, the probationer shall be absolutely appointed or employed, but otherwise his employment shall cease.

“Every officer under whom any probationer shall serve during any part of such probation shall carefully observe the quality and value of the service rendered by such probationer, and shall report in writing, to the proper appointing officer, the facts observed by him, showing the character and qualifications of such probationer and of the service performed by him; and such reports shall be preserved on file.”

Thus, at the very inception of civil service reform in this State, one of the principles adopted was the test of merit and fitness by a probationary term in all cases. The rule applied to everybody over whom the commission had jurisdiction, including everybody now in the “classified service.” At that time the classified service was divided into four classes designated A, B, C, and D. But the rule applied to all. In the classes in which examinations were required, the probationary term constituted an additional test of merit and fitness.

This was before there was any “Veteran Act.”

In 1884 the first Veteran Act was passed, and the Civil Service Law was amended to accord certain special privileges to veterans of the Civil War. But the rule about probationary appointments remained unchanged. And it remained unchanged in substance when the Veteran Act was amended in 1892 to cover volunteer firemen and when the civil service principles were put into the Constitution in 1894 — and until the first consolidation of the Civil Service Laws in 1899, when it was made a part of the consolidated statute.

The purpose and effect of the rule and of similar rules made by municipal civil service commissions were considered by the

courts in many cases, and are well settled. The purposes was explained by the Court of Appeals in *Kastor v. Kearny*, 164 N. Y., 64, as follows:

“The object of the probationary period is to enable the head of the department not only to ascertain the fitness of the probationer but to learn whether on the whole he is a satisfactory and agreeable person to have serve in the office and one who will become a reasonably efficient officer.”

The effect of the rule was to divide an employment into two separate and distinct terms; the first probationary, the second permanent. Judge Gaynor, reading for a unanimous Appellate Division in *People ex rel. Archer v. McAdoo*, 110 A. D. 740 (affirmed, 184 N. Y. 575), said:

“The effect of these provisions is to make the probation period a separate and distinct term, the statute using that very word. It does not run into and become part of the permanent tenure. It ends and there is then an appointment to the permanent tenure. The Municipal Civil Service rule provides that a failure of the appointing officer to notify the probationer during his probationary term that he will not be retained ‘shall be equivalent to permanent appointment.’ This does not destroy the separate identity of the probation term and the necessity for an appointment to the permanent tenure. On the contrary, the rule intends such an appointment and provides for an ‘equivalent’ of a formal appointment. The effect is the same as though a formal appointment were made indispensable.”

The effect of the rule upon veterans protected against removal for cause except after a hearing upon charges, was to make it possible for an appointing officer to dispense with their services at the end of the probationary period without any hearing — in other words their veterancy did not entitle them to reappointment after the expiration of their probationary terms. In *People ex rel. Hoeges v. Guilfoyle*, 61 A. D. 187, it was held that even a veteran of the Civil War could be removed without trial or hearing, at the end of his probationary term. This was before the Civil Service Law excepted Civil War Veterans from the requirement that all appointments be probationary. There have been a number of cases in New York City and the counties contained therein where competitive employees are not subject to re-

moval without an opportunity to explain, the courts always holding that while they could not be removed without such opportunity before or after the expiration of the probationary term, they could be so removed at the expiration of the probationary term.

People ex rel. Walter v. Woods, 168 A. D. 3.

People ex rel. Holston v. Woods, 167 A. D. 899.

People ex rel. Schlesinger v. De Forest, 83 A. D. 410.

People ex rel. Loomam v. Henderson, 77 Misc. 25.

People ex rel. White v. Color, 56 A. D. 171.

Matter of Dalton v. Darlington, 123 A. D. 855.

The rule is the same as in the case of a veteran appointed to office for a definite term of years. Unless he is a veteran of the Civil War, who was entitled as of right to an original appointment, he is not entitled as of right to a re-appointment. In other words, veterancy does not entitle an officer to hold over after his term has expired. (*In re Tiffany*, 179 N. Y. 455; *Williams v. Darling*, 67 Misc. 205.)

In 1899 the various civil service statutes and veteran acts which had been enacted since 1883, together with many provisions which had appeared only in the rules, were combined in one Consolidated Civil Service Law. (L. 1899, c. 370.) Section 8 of that act (which corresponds to section 9 of the present Civil Service Law), defined the unclassified and classified services in the same way that they are defined today and added:

“All appointments or employments in the classified service shall be for a probationary term not exceeding the time fixed in the rules.”

Thus the long-established rule was made a part of the statute, with this change—before 1899 the provisional appointments were all for three months exactly. Afterward it was different. Previously, when an appointing officer notified a subordinate of his appointment, it did not matter whether he indicated that it was a three-months term, as required by the rule, for the rule limited his power of appointment in the first instance, and the appointee would only be entitled to serve three months anyhow, unless kept on afterward. The statute was obviously drawn in contemplation of the existing rules but with intent to modify them.

Instead of allowing the Civil Service Commission in its rules to fix the probationary term, the law permitted it to fix only a maximum, leaving it to the appointing officer to fix the actual probationary term in each case, not to exceed the maximum fixed by the rules.

The rule theretofore had always applied to all positions "in the civil service" — but the Commission had no jurisdiction over the unclassified service, so in effect the rule applied to the entire classified service. The statute contemplating the continuance of the same or some similar rule, provided for probationary appointments to all positions in the classified service. But the Commission, in making rules to conform to the amended statute, fixed a maximum term of probationary appointment for positions in the competitive class only. The reason for this was probably that they believed that in the exempt and non-competitive classes the appointing officers should have unqualified power to remove even veterans, and by not limiting the probationary term they would make it possible for appointing officers to retain indefinitely the power to remove veterans in those classes — for section 21 (now section 22) of the statute at that time provided.

"A person serving under a probationary or provisional appointment shall not be deemed to be holding a position within the meaning of this section."

This language remained in the law only three years, being eliminated by Laws 1902, chapter 270, which statute also excluded Civil War Veterans from the requirements of section 8 that all appointments be provisional. The amendment of 1902 was not followed by any corresponding amendment of the civil service rules. The rule continued to limit the term of probationary appointments only in the competitive class. And as the rule stands today it provides:

(Rule XII, Paragraph 1)

"Except in the case of veterans of the Civil War, honorably discharged from the military or naval service of the United States, every original appointment to or employment in any position *in the competitive class* shall be for a probationary term of three months, and an appointing or nominating officer in notifying a person certified to him for appointment or employment shall specify the same as for a probationary term only; and if the conduct, capacity and

fitness of the probationer are satisfactory to the appointing officer, his retention in the service after the end of such term shall be equivalent to his permanent appointment, but if his conduct, capacity or fitness be not satisfactory he may be discharged at the end of such term.

“Whenever two or more persons appointed from the same eligible list are serving as probationers in the same department, and there is necessity for a reduction of the force of such department affecting such persons, they shall be preferred for retention in the order of their original standing upon such list.”

The statute says all appointments in the classified service shall be for a probationary term, leaving it to the rules to fix the maximum length of that term. The rules fail to fix any term in the non-competitive and exempt classes. What is the result? Certainly the Civil Service Commission cannot defeat the absolute mandate of the statute by neglecting to fix a maximum. The appointing officer is not only entitled to make a probationary appointment in order to judge whether he wishes to make a permanent appointment, but he is required by law to do so. The failure of the civil service rules to fix a maximum cannot defeat the right or the duty of the appointing officer. In the absence of any maximum fixed by the rules the appointing officer may make the probationary term as long or as short as he pleases.

But the statute absolutely requires a probationary term.

Where an appointing officer makes an appointment without designating the length of the probationary term, one of three things must be the result: either (1) he thereby defeats the statute, or (2) his appointment is void, or (3) he is still at liberty to fix the duration of the probationary term. I cannot concede that the appointing officer by neglecting a duty can repeal a mandatory statute. On the other hand, the fixing of the probationary term being only one of many formalities, surrounding an appointment, its omission, to my mind, does not necessarily render the appointment void *ab initio* — at least the appointee becomes a *de facto* officer or employee. So it must be that the appointing officer retains the right (and duty) to fix the probationary term until he exercises it.

The office of Superintendent of Public Buildings is a continuing one, so the fact that there has been a change in the incumbent of the office makes no difference. I believe that when an appointing officer has once fixed a probationary term under section 9 of

the Civil Service Law, he is *functus officio* and cannot change it; but until he does fix it he retains the right and remains under a duty to fix it.

I therefore advise you that in my opinion you are at liberty to fix the probationary term of employees, appointed by your predecessor just before his retirement, in those cases where he did not fix it. And I advise you that it is in your discretion to retain such appointees after the expiration of their probationary terms, or to let them go. Failure to give notice, prior to or at the end of the probationary term, to any you wish to drop, will probably be equivalent to a permanent appointment, so notice should be given to any of them whom you determine to be unfit or unsatisfactory.

There is no probationary term in the case of Civil War Veterans, but in the case of any other person protected by section 22 of the Civil Service Law, that statute does not require that he be given a hearing, on charges, etc., before being refused a permanent appointment at the end of his probationary term.

Dated, February 21, 1921.

CHARLES D. NEWTON,
Attorney-General.

By THOMAS F. FENNEL.

To HON. OTTO JANTZ,

*Superintendent of Public Buildings,
Albany, N. Y.*

LAWS OF 1913, CHAPTER 293, ERIE COUNTY COMMISSIONER OF CHARITIES AND CORRECTION — AUTHORIZATION OF SUPERVISORS TO APPOINTMENTS.

Under the provisions of chapter 293 of the Laws of 1913, the offices of superintendent or keeper of the penitentiary, medical examiner, assistant medical examiner, superintendent of the county lodging house and keeper of the morgue, in Erie County, ceased to exist on January 1, 1914, and the offices of superintendent of the county home and hospital, otherwise called keeper of the almshouse or poor house, and superintendent of the poor, were discontinued, but the incumbents of those offices theretofore elected were continued as subordinates of the commissioner of charities and correction. The powers and duties of all these offices devolved upon the commissioner and he could only appoint subordinates, except a deputy to be known as county physician, when the board of supervisors authorized such appointments.

INQUIRY

Under the provisions of chapter 293 of the Laws of 1913 is authority from the board of supervisors a condition precedent to the appointment of subordinates by the commissioner of charities and correction?

OPINION

Chapter 293 of the Laws of 1913 provides:

"Section 1. There is hereby created in and for Erie county, the office of commissioner of charities and correction. The term of office shall be for six years and the salary thereof shall be five thousand dollars per annum. In case of a vacancy occurring during a term the same shall be filled by appointment by the board of supervisors until the first day of January next following the ensuing general election, except that if such vacancy occurs within thirty days prior to the general election, a commissioner shall not be elected until the general election in the year following and the commissioner appointed by the board of supervisors shall continue in office until the first day of January following such election. A commissioner elected at a general election shall hold his office for the full term of six years. A commissioner shall give a bond in the penal sum of five thousand dollars for the faithful discharge of the duties of his office. A commissioner shall be elected at the general election in the year nineteen hundred and thirteen.

Section 2. Upon the taking of office by the commissioner elected in the year nineteen hundred and thirteen all the rights, powers, authority and jurisdiction now possessed by, and all duties devolving upon the superintendent or keeper of the penitentiary, the superintendent of the county home and hospital, otherwise called keeper of the almshouse or poor house, the superintendent of poor, the medical examiner and assistant medical examiner, the superintendent of the county lodging house, and the keeper of the morgue shall devolve upon, and be possessed, exercised and performed by such commissioner in person or by deputy.

Section 3. The commissioner shall have the power to appoint and at pleasure remove all officers and employees serving in or connected with the penitentiary, the almshouse or county home, the county hospital, the office of the medical examiner, the county lodging house and the morgue. The commissioner shall appoint a deputy to be known as the county physician, who, under the commissioner, shall have charge and control of the county hospital, and of the physicians, nurses and employees employed thereat or serving therein; of the care of the sick, confined in the peni-

tentiary; of the physicians, medical attendants, and nurses employed or serving at the penitentiary and at the county lodging house; of the morgue, and of the keepers and employees serving in the morgue. The said county physician, under the commissioner, and in person, or by an assistant, or by assistants, lawfully appointed or employed, shall exercise the powers and perform the duties now exercised and performed by the medical examiner and the deputy medical examiner, save as herein otherwise especially provided. In addition to the powers conferred upon the commissioner by existing law or by this act, he may appoint and at pleasure remove such deputies, subordinates, clerks and employees as may be authorized by the board of supervisors, and at salaries or compensation as may be fixed by said board. The commissioner shall have such other powers and perform such other duties as the said board may prescribe.

Section 4. Notwithstanding the provisions hereof, a superintendent of the poor and a superintendent of the county home and hospital, otherwise called the keeper of the almshouse, or poor house, heretofore elected, and in office on January, first, nineteen hundred and fourteen, shall continue to be such superintendents respectively, with such powers and duties as the commissioner may prescribe, until the expiration of the term for which they were severally elected; and at the expiration of the terms of said incumbents said offices shall cease and determine.

Section 5. This act shall take effect immediately."

The purpose and intent of the act is perfectly clear. Six departments of the government of Erie county were consolidated in one new department. The offices held by the heads of these departments, some of which had been elective and some appointive, were to be discontinued and the powers and duties thereof were to be transferred to the head of the new departments — the commissioner of charities and correction. The elective heads of two of the departments having been chosen for terms which would not expire until after January 1, 1914, were to be retained in the public service as subordinates "with such powers and duties as the commissioner may prescribe until the expiration of the terms for which they were severally elected; and at the expiration of the terms of said incumbents said offices shall cease and determine.

On January 13, 1914, the board of supervisors adopted a resolution requesting the county attorney to render an opinion as to whether there then legally existed in Erie county any of the positions of superintendent of the penitentiary, superintendent of the poor, superintendent of the county lodging house and keeper of the morgue. In response to this request the county attorney rendered an opinion which appears in the Proceedings of the Board of Supervisors for 1914 at page 27. The opinion is very long and by far the larger part of it is given up to argument and the quotation of authorities in support of the proposition that subdivision 5 of section 12 of the County Law, as amended by chapter 742 of the Laws of 1913, did not operate to abolish the positions referred to. I can agree with all conclusions of the county attorney with respect to section 12 of the County Law, but I cannot agree with his conclusions in interpreting chapter 293 of the Laws of 1913. It seems to me perfectly clear that the intent of the Legislature was to abolish the offices of the heads of the various departments which were being consolidated, and to vest their powers in the newly created commissioner. A specific saving clause was inserted for the purpose of keeping the already elected superintendent of the poor and superintendent of the county home in the service until the expiration of the terms for which they had been chosen, but even as to them, their powers were vested in the commissioner and they were to be retained in the service only for the purpose of exercising such powers and duties as the commissioner might prescribe.

The argument of the learned county attorney that it would be impossible for the commissioner to exercise all his powers in person and that therefore the abolished offices must be considered as having been continued, does not appeal to me. It has always been customary for the Legislature or the Constitution to create an office and to authorize the officer to appoint such subordinates as may be provided for or approved by some other authority. In any of these cases the officer would be unable to perform his duties if the approving authority neglected or refused to authorize the creation of subordinate positions, but it has never been held that such a situation results in the automatic creation of such positions. The mere fact that the failure of the Board of Supervisors to act might prevent the operation of certain functions of the government, does not obviate the necessity for the action of the board. If it were otherwise the heads of state and

county departments could defy the Legislature or the Board of Supervisors in the matter of appropriations.

It seems to me that the opinion of the learned county attorney that its length and complexity cannot make up for the lack of is drawn with the purpose of arriving at a given conclusion, but sound reasoning contained in it. In my opinion the positions superintendent or keeper of the penitentiary, medical examiner, assistant medical examiner, superintendent of the county lodging house and keeper of the morgue, ceased to exist on January 1st, 1914, and the positions of superintendent of the county home and superintendent of the poor ceased to exist on the expiration of the terms of the persons holding them on January 1st 1914.

The powers and duties of the offices abolished devolved upon the office of commissioner and he was authorized by the statute to execute them "in person or by deputy." This did not mean by one deputy but by such deputies as might be created according to law. The latter part of section 3 of the statute providing that the commissioner "may appoint and at pleasure remove such deputies, subordinates, clerks and employees as may be authorized by the Board of Supervisors and at salaries or compensation as may be fixed by said board," clearly indicates the legislative intent to have the commissioner act through such deputies or other subordinates as the Board of Supervisors might authorize. I do not think he had any power of appointment (except the deputy known as county physician) until positions to be filled were authorized by the Board. It is possible that the subordinates who have been appointed and whose salaries have been provided for by the Board of Supervisors, have been *de facto* officials, and I have no doubt that the courts would hold that their various acts were valid and binding upon the county. But in my opinion in order to have proper *de jure* deputies and other subordinates, there should be a formal authorization by the Board of Supervisors in advance of their appointment; in other words, the supervisors should create the positions and then the commissioner of charities should fill them by appointment. There should be no difficulty in the passage of a resolution creating all the positions which the supervisors are willing to provide salaries for, and the passage of such a resolution would eliminate any possible doubt in the future.

I note that on December 28, 1914, the then commissioner of charities and correction addressed to the supervisors a communica-

tion printed in the Proceedings of the Supervisors for 1914, at page 983, calling attention to the expiration of the term of the superintendent of the poor and to the fact that his office then automatically ceased, and requesting the creation of an office of deputy commissioner of charities and correction in charge of the poor department. It seems to me that the commissioner at that time adopted the proper procedure, and I do not think he should have appointed a subordinate to perform the duties of the discontinued superintendent of the poor until the Board of Supervisors had acted favorably upon his application. It seems probable that the Board of Supervisors failed to act because they were relying upon the opinion of the county attorney, above referred to, but as pointed out above, I cannot concur in that opinion and I recommend that the Board of Supervisors be requested to adopt a resolution creating all necessary positions in the department of the commissioner of charities and correction.

CHARLES D. NEWTON,
Attorney-General.

Dated March 30, 1921.

TO HON. HORACE F. HUNT, *Commissioner of Charities and Correction, Buffalo, N. Y.*

STATE CONSTITUTION, ARTICLE VII, SECTION 8; ARTICLE VII, SECTION 7, STATE LAND ACQUIRED FOR A SPECIFIC PURPOSE WITHIN FOREST PRESERVE AREA.

Control and power of disposal of a parcel of land appropriated as a part of the Black River Canal System at Old Forge.

Said parcel of land is owned by the State and is a part of the canal system.

Upon abandonment it can be disposed of by the Legislature in its discretion or by the Canal Board or the Commissioners of the Land Office as prescribed by the Canal Law or the Public Lands Law.

An inquiry from the office of the State Conservation Commission raises three questions concerning a parcel of land three rods in width and running from what is known as the State Fish Hatchery Parcel at Old Forge, N. Y., to the end of the Brown's Tract road and containing 1.41 acres, viz.:

1. Is it a part of the forest preserve?
2. If not, what State department now has jurisdiction and control thereof?
3. If not a part of the forest preserve, would legislation authorizing its sales be desirable?

OPINION

It appears that the land in question which is located in Township 7, Brown's Tract, Town of Wilmurt, county of Herkimer, was appropriated by the State at the time it took several other parcels of land for the purpose of enlarging the reservoirs and feeders of the Black river canal, to provide for a roadway from the end of the Brown's Tract road to the dam across Moose river at the outlet of the Fulton Chain of Lakes.

Senate Document No. 85 of the year 1894 (Vol. 9), has as Volume 2 thereof, the Annual Report of the Forest Commission for the Year 1893, transmitted to the Legislature January 16, 1894. This report, at page 412 thereof, has the award of the Board of Claims made in March, 1885, in connection with the above canal appropriation. This award appeared originally in Award Book, Volume 2, page 163.

The findings of fact state that Alexander B. Lamberton, the claimant, was the owner and in possession of some 1,358.62 acres of land, including the premises herein as well as the "Old Forge" dam and surrounding territory. The sixth finding of fact is as follows:

"That said State also took and permanently appropriated to its use for a road 3 rods wide, the following described land, the property of Claimant."

Then follows a specific description of the parcel in question. It is further found that the fair value of the lands so permanently appropriated is the sum of \$250 and that the injury and damage sustained by said claimant by reason of such appropriation of land, loss of water rights, etc., is the sum of \$4,800. The said Board thereupon awarded the claimant the sum of \$4,800 in full payment for said appropriation. In case No. 117, file 564, in the annual records of the State Comptroller's office is a receipt for \$4,800 for Black river canal appropriation "in full of an award made by the Board of Claims for the temporary occupation and permanent appropriation of lands and property. A. B. Lamberton." Payment was made pursuant to chapter 463 of the Laws of 1885 which was a special appropriation act naming various persons, including Lamberton, and the amount of awards to be paid to each. From these facts it is evident that the land when appropriated became a part of the Black river canal system.

Information at hand indicates that there was at one time a poor road in use over this strip, but this has in part been abandoned

and a number of important buildings in the village of Old Forge are located on lots partially or entirely on said parcel. Title to said lots has in many cases been conveyed to the present owners or their predecessors by warranty deeds. A part of the strip is in the bed of the present improved State road at this point.

The parcel of 9.78 acres known as the Fish Hatchery Parcel at the end of this strip is used by the State as a station for the propagation of fish and is in charge of the Conservation Commission.

The Constitution of 1846, article VII, section 6, provided:

“The legislature shall not sell, lease, or otherwise dispose of any of the canals of the state, but they shall remain the property of the State and under its management forever.”

The Constitutional Convention of 1867 attempted to modify this provision so as to leave the Legislature at liberty to dispose of any canal which did not pay expenses. It was shown that several lateral branches, among them the Black river canal, had been losing ventures for the State. The Convention, however, concluded to adhere to the earlier policy and prohibit the disposition of any canal.

In 1874, article VII, section 6, was amended to read as follows:

“The legislature shall not sell, lease or otherwise dispose of the Erie canal, the Oswego canal, the Champlain canal, or the Cayuga and Seneca canal; but they shall remain the property of the State, and under its management forever.”

The section further provides for the disposal of moneys received from the sales of canal lands. By this amendment the Legislature was given the discretion to dispose of the Black river canal lands. Two legislative commissions reported to the Legislature in 1876 and both favored the retention of the said canal for its feeders and reservoirs as a source of supply for the Erie. Acting presumably upon the reports of these commissions, the Legislature passed chapter 404 of the Laws of 1877 authorizing the abandonment and sale of certain lateral canals but did not include the Black river canal. There were no statutory or constitutional changes affecting the parcel of land under discussion until the constitutional amendment of 1882 taking effect January 1, 1883. By this amendment the Black river canal was added to the existing list of canals that could not be sold, leased or otherwise disposed of. The Constitution of 1894, article VII, section 8, retained the canal provision affecting the Black river canal and the prohibition is still in force.

It being established that the constitutional provision prohibiting the sale of canal lands has been operative against said land for all the periods since its appropriation with the exception of about three years immediately prior to January 1, 1883, and that during said three years the Legislature having the power to dispose of it, did not do so, the question as to whether it has lost its status as canal lands in any other way becomes pertinent.

The constitutional prohibition against sale or other disposal includes all canals but the construction of this section by the courts has always been such as to allow the State to dispose of those parts of the canal system which were not desirable or necessary for its continued operation.

People v. Stephens, 13 Hun, 17.

Genessee Valley Canal R. R. Co. v. Slight, 49 Hun, 35.

Lynch v. Partridge, 36 Misc. 302.

Matter of Comstock, 25 State Reporter, 611.

Sweet v. City of Syracuse, 129 N. Y. 316.

Opinions of the Attorney-General for the year 1895, page 349.

Opinions of the Attorney-General for the year 1900, page 128.

Opinions of the Attorney-General for the year 1909, pages 475 and 706.

Opinions of the Attorney-General for the year 1918, page 191.

Chapter 511 of the Laws of 1915 amending section 5 of chapter 147 of the Laws of 1903, which is the Barge Canal Act, by section 5 provided for the sale of lands, structures or waters now used for canal purposes and rendered unnecessary by reason of said improvement. It also provided for the disposal of lands becoming unnecessary by reason of change of the alignment of the canal. It is clear that neither class of lands described includes this one.

The General Canal Law, article III, section 15, subdivision 3, provides that the Canal Board may:

“Determine whether any lands taken for the purposes of the canals, may be sold or exchanged for other lands, beneficially to the state, and in all cases of determination that any such lands may be sold or exchanged, may sell the same, or may exchange the same for other lands required for the

purposes of the canals, and in order to carry any such sale or exchange into effect may authorize the superintendent of public works to execute and deliver to the purchaser, in the name of the people of the state, a quit-claim of such lands. But before such deed shall be effective, it shall be recorded by the superintendent of public works in the office of the secretary of state. And the superintendent of public works is hereby directed forthwith to record duplicates of all deeds heretofore executed by him under this subdivision in the office of the secretary of state. This provision shall not be construed to affect the powers of the commissioners of the land office to sell abandoned canal lands, as otherwise directed by law."

Subdivision 4, confers upon the Canal Board the power to "Determine whether lands, taken for the purposes of the canals have been abandoned." After such abandonment the lands may be disposed of according to the Public Lands Law if they do not fall within the purview of section 5 of the Barge Canal Act.

The Public Lands Law, section 50, provides:

"Sale of abandoned canal lands. The commissioners of the land office may sell and convey the right, title and interest of the state in and to any real property, acquired for canal purposes, which the canal board, by resolution, determine to have been abandoned for such purposes, including any real property, which, at the time it was taken for canal purposes, was owned by the state, and was thereafter conveyed by the state with adjoining lands without express reservation of the part covered by the canal, other than abandoned canals, sold and conveyed by the state prior to April twenty-seventh, eighteen hundred and sixty-nine, and other than dry docks within the canal blue lines in the city of Oswego, built by permission of the state, and other than lands and structures rendered useless for canal purposes by the improvement of state canals authorized by chapter one hundred and forty-seven of the laws of nineteen hundred and three and chapter three hundred and ninety-one of the laws of nineteen hundred and nine and the acts amendatory thereof and supplemental thereto, proceedings for the abandonment and sale of which are provided for in sections fifty-two, fifty-three, fifty-four, fifty-five, fifty-six, fifty seven, fifty-eight, fifty-nine and fifty-nine-a of this chapter, and chapters eight hundred and ninety-

three and eight hundred and ninety-four of the laws of nineteen hundred and eleven. If such property is used at the time of such abandonment as a hydraulic canal, such conveyance shall not prevent the future use thereof for that purpose, but shall expressly reserve the right to continue the same."

The only part of this section which can apply to the present discussion is the general provision at the beginning thereof. The lands specifically described in the express terms of the statute beginning with the words "including any real property" could not include the strip of land in question. This class specifically described is abandoned canal lands sold by the state prior to April, 1869, with the exception of certain dry docks in the city of Oswego, the lands rendered useless for canal purposes by the Barge Canal Improvement (chapter 147 of the Laws of 1903), and the Cayuga and Seneca Canal Act (chapter 391 of the Laws of 1909), proceedings for the abandonment and sale of which are provided for by sections 52 and 59-a of the said Public Lands Law, chapters 893 and 894 of the Laws of 1911 refer to lands in Schenectady county.

Section 52 refers to two classes of lands only, viz., those for which the improved canal furnishes a substitute and canal lands no longer necessary because of an alternative available water route. Evidently neither of these classes include this parcel.

The legal title of the State could not be lost by non-user or adverse possession. 49 Hun, 35, cited above. There could be no abandonment of the title of the land in fact evidenced by use and possession of others than the State that would constitute a legal abandonment.

Robie v. Sedgwick, 35 Barb. 319.

East Tennessee Iron & Coal Co. v. Wiggin, 68 Fed. 446.

City of Philadelphia v. Riddle, 25 Pa. State, 259.

The abandonment in contemplation of the canal statutes is not directed to title, but is procedure laid down by law to formally determine by official action, after proper proof submitted, that the particular land there under consideration is no longer necessary for the purposes for which it was taken and formerly used. The State is the only one competent to decide this question. The only way to abandon it is by an act of the Legislature or by following

out the statutory procedure provided. Affirmative action must be taken by the State or no abandonment occurs. Abandonment as a prerequisite to a sale of canal land can mean nothing less than a compliance with the statutory requirements.

Upon abandonment the title to said land does not revert to the original owners or their successors, but remains in the State.

Rexford v. Knight, 11 N. Y. 308.

Elbridge v. City of Binghamton, 120 N. Y. 309.

It is competent for the Legislature to pass an act declaring canal lands abandoned and directing their sale.

Opinions of the Attorney-General for the year 1911,
page 116.

An examination of the statutes since 1880 shows no action on the part of the Legislature affecting this property and a search in the various State departments discloses no evidence that it has ever been officially abandoned.

The land never having been abandoned by the Legislature nor by the Canal Board must still be canal lands subject to the constitutional prohibition against the sale or disposal of the same.

Chapter 13 of the Laws of 1883, directed that after its passage no sale should be made of lands of the State in Herkimer and other counties. It is not now important to consider whether this act applied to canal lands or not as it was expressly repealed by chapter 332 of the Laws of 1893 and I know of no present prohibition of law prohibiting the sale of the land in question after the necessary statutory requirements have been complied with.

The various Forest Preserve Acts, although nominally affecting the property at the dam to which this roadway leads, could not impress the lands with the attributes of forest preserve lands because they were not yet abandoned for the use for which they were taken and would therefore still be within the constitutional inhibition against use or disposal for any other purpose than that for which they were taken, viz., for canal use. I quote from the Attorney-General's Opinion of 1918, cited above:

"So far as the Legislature has made provision for the canal improvement and has appropriated lands therefor, such improvement must be deemed to be a separate and distinct public work and the lands purchased in good faith and sound discretion for canal purposes are canal lands and not part of the Forest Preserve."

That is equally as true of lands appropriated for the old canal as it is for the present barge canal system of which they are a part.

The Conservation Law, section 62, subdivision 1, sub-head "a" excepts from the forest preserve "lands within the limits of any village or city."

The General Construction Law, section 54, defines the term "village" to mean "an incorporated village."

The village of Old Forge was incorporated in 1903, and, if the land were now abandoned, it would not become a part of the forest preserve and be subject to the constitutional prohibition against sale, article VII, section 7, but would become unappropriated State lands as defined in section 30 of the Public Lands Law.

As already noted, section 5 of the Barge Canal Law providing for the disposal of canal lands could not apply to this land because of the limitations of the act. So far as canal lands appropriated prior to 1903 are concerned, it only applies when they are rendered unnecessary by the improvements directed by the Barge Canal Act.

A summary shows three methods by which the land might be disposed of:

1. Pursuant to subdivision 3 of section 15 of the Canal Law. Operating thereunder the Canal Board would be bound to proceed most "beneficially" to the State. This would, undoubtedly, mean an appraisal and a sale for the approximate value thereof. An exchange could only be made for lands required for canal uses.

2. Under subdivision 4 of said section 15 of the Canal Law, the Canal Board could declare the lands abandoned and then they could either be sold pursuant to section 50 and the subsequent sections of the Public Lands Law or disposed of by act of the Legislature.

3. The Legislature could pass a law declaring said lands abandoned and then sell or make such other disposal of them as it sees fit.

The answer to your first question is that the land referred to is not a part of the forest preserve.

Answering your second question, I would say, it is canal land within the immediate jurisdiction and control of the Department of Public Works and subject to disposal, when and if abandoned, as above set forth.

As to whether it would be desirable for the Legislature to authorize its sale, it is not within the province of this office to determine. However, if the Legislature desires to do so it clearly

has the power to make such disposal of it as it sees fit subject only to the restrictions above noted. Certain inaccuracies in the map of the parcel submitted to me have been called to my attention which would make it advisable to have a corrected map made if any disposal is to be made of the premises.

Dated April 6, 1921.

CHARLES D. NEWTON,
Attorney-General.

By THOS. F. FENNELL,
First Deputy.

TO HON. GEORGE D. PRATT, *Conservation Commissioner.*

HUNTING AND FISHING ON INDIAN RESERVATIONS BY TRIBAL INDIANS AND PERSONS OTHER THAN INDIANS; APPLICATION OF STATE CONSERVATION LAW AND MIGRATORY BIRD TREATY ACT THERETO; SECTION 11, INDIAN LAW, AND SECTION 8, PUBLIC LANDS LAW, IN RELATION THERETO CONSTRUED.

Persons other than Indians hunting or fishing on Indian Reservations are subject to the State Conservation Law. Indians have redress for hunters trespassing on tribal lands.

The Migratory Bird Treaty Act applies to tribal Indians, but a State law does not.

INQUIRY.

An inquiry from the office of the State Conservation Commission raises two questions concerning the right to punish persons other than Indians who hunt or fish on tribal lands in this State, and concerning the application of the Migratory Bird Treaty Act to tribal Indians, and its enforcement against the same, viz.:

1. May a white man go on an Indian reservation in the State of New York out of season and shoot game birds?
2. May a white man lawfully go on an Indian reservation in the State of New York in the open season and shoot protected birds?
3. May an Indian shoot protected migratory birds on his reservation in the State of New York out of season?

OPINION

Question No. 1. May a white man go on an Indian reservation in the State of New York out of season and shoot game birds?

There is no section of the Federal Statute which prohibits a per-

son other than an Indian from hunting at any time on the reservations in the State of New York.

Section 2137 of the United States Revised Statutes, prohibits hunting or trapping in the Indian country, but it has been held that the reservations in this State are not Indian country within the meaning of that statute. A white person who shoots game out of season on an Indian reservation can be punished according to the laws of this State, as the Conservation Law of this State is applicable to persons other than Indians, for violations committed upon an Indian reservation in this State.

U. S. v. Draper, 164 U. S. 240.

U. S. v. McBratney, 104 U. S. 621.

Question No. 2. May a white man lawfully go on an Indian reservation in the State of New York in the open season and shoot protected birds?

As we have seen, there is no Federal Statute which prohibits persons other than Indians, from hunting and fishing on the Indian reservations, and there is no law of this State which has that effect.

Persons other than Indians, therefore, who hunt or fish on Indian reservations in the open season cannot be punished under the State or Federal Law. Indians living in tribal relationship on the reservations of this State may prevent hunting or fishing upon such lands. A person who hunts or fishes upon these lands without consent can be sued in the State courts for trespass through the district attorney of the county or by representatives of the Indians.

Section 11, Indian Law

Section 8, Public Lands Law

Question No. 3. May an Indian shoot protected and migratory birds on his reservation in the State of New York out of season?

The first Migratory Bird Law passed by Congress was the Act of March 14th, 1913, Chapter 145, 37 Stat. 847. (Compiled Stats. 1913, Section 883.) At that time no treaty on the subject had been negotiated with Great Britain and the statute was held unconstitutional.

U. S. v. McCullough, 221 Fed. Rep. 288.

Missouri v. Holland, 252 U. S. 416 at 423.

The present law is known as The Migratory Bird Treaty Act, passed July 3rd, 1918, Chapter 128, 40 Stat. 755.

On December 8th, 1916, a treaty between the United States and Great Britain for the protection of certain migratory birds, was proclaimed.

Vol. 39 U. S. Stats. at Large, Part 2, Page 1702.

Sections 1 and 3 of said treaty are as follows:

"Sec. 1. The close season on migratory game birds shall be between March 10th and September 1st, except that the close season on the lemmicolæ or shore birds in the maritime provinces of Canada, and in those states of the United States bordering on the Atlantic Ocean which are situated wholly or in part north of Chesapeake Bay, shall be between February 1st and August 15th, and that Indians may take at any time scoters for food, but not for sale.

Sec. 3. The close season on other non-game birds shall continue throughout the year, except that Eskimos and Indians may take out of season, auks, auklets, guillemots, murrers, and puffins, and their eggs, for food, and their skins for clothing, but the birds and eggs so taken shall not be sold or offered for sale."

Regulation No. 7, made by the Commissioner of Agriculture, pursuant to the act and approved by the President, provides as follows:

"Sec. 7. In Alaska Eskimos and Indians may take for the use of themselves and their immediate families in any manner, and at any time and place, and transport auks, guillemots, murrers and puffins and their eggs for food and their skins for clothing."

Vol. 40, Part 2 U. S. Stats. at Large, Page 1816.

The treaty therefore, and the regulations made pursuant to statute by providing specifically that Indians may take certain birds for certain purposes, would seem to indicate that the statute as well as the treaty and the regulations, were intended to apply to Indians on the reservations, as well as to other persons.

In *Missouri v. Holland*, 252 U. S. 416 at 434, the present act has been held valid because enacted pursuant to the treaty above referred to.

In construing a doubtful statute the court will consider the evil which it was designed to remedy, and for this purpose will look into contemporaneous events, including the situation as it existed, and as it was impressed upon the attention of the legislative body while the act was under consideration.

Holy Trinity Church v. U. S. 143 U. S. 457.

In my opinion, therefore, the Migratory Bird Treaty Act applies to Indians living in tribal relationship on reservations in this State, and such Indians are amenable to the provisions of such statute, and my opinion further is, that section 7 of the Migratory Bird Treaty Act, providing that nothing in the act shall be construed to prevent the several states from making or enforcing laws or regulations not inconsistent with the provisions of the Convention or of the act, was not intended to confer jurisdiction upon any state to pass a State law applicable to or enforceable against Indians living in tribal relationship on a reservation in such state.

From the foregoing considerations it will be evident that the United States Government has exclusive jurisdiction to enforce the provisions of the Migratory Bird Treaty Act against Indians living in tribal relationship on reservations for violations of the provisions of such act.

Dated April 14, 1921.

CHARLES D. NEWTON,
Attorney-General.

By THOMAS F. FENNELLS,
First Deputy.

To: HON. GEORGE D. PRATT, Conservation Commissioner.

GENERAL CORPORATION LAW, ARTICLE I, SECTION 3, SUBDIVISION 1, WORKMEN'S COMPENSATION LAW, ARTICLE I, SECTION 2, GROUP 43; SECTION 3, SUBDIVISIONS 3 AND 5.

The employees of Chautauqua Institution are not included within the provisions of Article I, Section 2, Group 43, nor Section 3, Subdivision 5, of the Workmen's Compensation Law.

INQUIRY

Is it necessary to insure the employees of Chautauqua Institution under the Workmen's Compensation Law?

OPINION

It appears by a communication from Wilson C. Price, counsel for Chautauqua Institution, that a question has arisen whether it is obligatory upon the corporation to insure its employees pursuant to the provisions of the State Compensation Law.

Chautauqua now operates under a charter granted by the Legislature by chapter 196 of the Laws of 1902, passed March 21st of that year.

This act provides:

Section 1, that the name of the corporation, Chautauqua Assembly, be changed to Chautauqua Institution.

Section 2 enumerates the purposes as follows: "To promote the intellectual, social, physical, moral and religious welfare of the people." It recites that, for its avowed purpose, it may hold meetings, provide recreation, instruction, health and comfort on its grounds at Chautauqua, conduct schools and classes, maintain libraries, museums, reading and study clubs and other agencies for home education, publish books and serials and do such other things so are needful to carry out its general scheme.

Section 3 consolidates Chautauqua University and the Chautauqua School of Theology, then under the sole control of the same trustees as the corporation, Chautauqua Assembly, with the corporation, Chautauqua, and makes their work an integral part of the work of said corporation.

Section 4 provides that the members shall be —

First. Persons now living and named in the original and supplemental certificate of incorporation.

Second. All persons owning a lease on one or more lots or section of a lot on the lands of the corporation.

Third. All persons elected by the trustees.

Section 5 vests the government and control of said corporation in twenty-four trustees. It provides:

"The provisions of the General Corporation Law, not inconsistent with the act relating to directors and boards of directors shall apply to said trustees."

It further provides for a division of the trustees into classes, A and B, and for their terms of office.

Section 6 provides for the election of trustees of Class A directing that they shall ballot annually at a time and place to be selected by them for five trustees of Class A.

Section 7 defines the method of electing Class B trustees providing that the election be held annually on the second Tuesday of August on the corporation grounds at Chautauqua. The voters at such election are to be members owning leases and intermediate vacancies are to be filled by designation by the trustees of that class.

Section 8 is a classification of the terms of the trustees.

Section 9 continues in force the existing by-laws. The trustees are authorized to enact, alter or repeal by-laws and said by-laws may provide that the executive board of the trustees may enact any rule consistent with law and the by-laws for the management of the business or property of the corporation.

Section 10 authorizes the trustees to sell and lease lands without leave of any court.

Section 11 confirms previous leases made without leave of the court.

Section 12. "Inconsistent Laws.—No provision of the General Corporation Law or of the Membership Corporation Law inconsistent with this act shall apply to said corporation."

Section 13 locates the principal office on the Assembly Grounds at Chautauqua, but it is provided that lawful meetings of trustees may be held without the State.

Section 14 is a repealing clause.

Section 15 saves to the corporation the rights, duties, etc., of the corporation as formerly known.

The act incorporating the Chautauqua School of Theology (chapter 63 of the Laws of 1881), followed the same general lines as the present charter, except that the objects were stated as the teaching of subjects in preparation for the clerical profession, and it was authorized to grant degrees.

Chautauqua University was incorporated by an act passed March 30, 1883, chapter 148 of the laws of that year, with the avowed object of promoting liberal education. It had the right to give diplomas and university degrees.

There is no indication in the various charters of incorporation that an attempt was being made to create municipal bodies for the purpose of local government. There is on the other hand a very evident intent to create eleemosynary corporations in each case.

There are various other acts, passed at different times in the history of the institution, affecting the regulation and control thereof. Among them is chapter 138 of the Laws of 1881 by which the corporation then denominated The Chautauqua Lake

Sunday School Assembly was authorized to make and enforce rules in regard to slops and garbage within the corporation grounds and a plan was provided for assessment to defray the expenses thereof.

Another statute is chapter 403 of the Laws of 1886 which prohibited railroad companies from constructing or operating railroads through the institution grounds.

Chapter 312 of the Laws of 1900 constituted the grounds of the corporation a separate health district and made the institution trustees a board of health exempt from local jurisdiction, but subject to the visitation and inspection of the State Board of Health.

In none of these acts has any State fund been made available for the use of the corporation.

The Workmen's Compensation Law (chap. 67, Consolidated Laws), provides in section 2, that,—

“Compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments: * * * Group 43. Any employment enumerated in the foregoing groups but carried on by the State or a municipal corporation or other subdivision thereof, notwithstanding the definition of the term ‘employment’ in subdivision five of section 3 of this chapter.”

It must be conceded that many of the workers employed about the institution are in fact included within the literal descriptions in the “foregoing groups.”

Employment is defined in subdivision 5 of section 3 of the act as follows:

“‘Employment’ includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain, or in connection therewith, except where the employer and his employees have by their joint election elected to become subject to the provisions of this chapter as provided in section 2.”

Subdivision 3 of section 3 of said act is as follows:

“‘Employer,’ except when otherwise expressly stated, means a person, partnership, association, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association or corporation, employing workmen in hazardous employments including the state and a municipal corporation or other political subdivisions thereof.”

In order to be subject to the terms of the act the institution must be found to be either an employer engaged in an occupation "for pecuniary gain," or it must fall within one of the classifications of Group 43 above cited.

When the Workmen's Compensation Law was enacted in 1913 by chapter 816 of the Laws of that year, the word "employer" was expressly defined as not including the State or a municipal corporation or other political subdivision thereof.

By chapter 316 of the Laws of 1914, the act was amended to define the term "employer" to include "the State and a municipal corporation or other political subdivision thereof."

By an opinion reported at page 191 of opinions of the Attorney-General for the year 1914, it was pointed out that although the State and its political subdivisions were at that time subject to the operation of the law, yet the act did not apply to any activities, State or otherwise, unless the work carried on was for pecuniary gain. This position was sustained in the case of *Allen v. The State of New York*, 173 A. D. 455.

It was probably the fact, that the number of instances where the sovereign or its political subdivisions are engaged in any work for pecuniary gain are almost negligible, that led the Legislature, in order to make the State and its subordinate divisions more fully amenable to the operation of the law, to pass the amendment to section 1 of chapter 622 of the Laws of 1916, which added to the various groups of employments subject to the operation of the act, Group 43 above set forth. The term "employment" as there defined is made applicable to the State or its political subdivisions regardless of whether the work is conducted for pecuniary gain or not as limited in the general definition in subdivision 5 of section 3 of the act. All employers properly coming within Group 43 are subject to the operation of the law without regard to the limitations of the general definition of the term "employment."

As stated above the conclusion upon the query advanced will be determined by the answer to two questions; is this one of a class of corporations carrying on business for pecuniary gain, or are its workers engaged in an employment comprehended within the descriptions in the various groups in the compensation law and carried on by it as "a municipal corporation or other subdivision thereof."

Is it a municipal corporation or other subdivision thereof within the meaning of the Workmen's Compensation Law? The determination of this question is not without difficulty. The General

Corporation Law, Consolidated Laws, chap. 23, section 3, defines a municipal corporation thus: "A 'municipal corporation' includes a county, town, school district, village and city and any other territorial division of the State established by law with powers of local government."

Although the authorities are not entirely in accord as to the proper technical classification of public corporations with relation to their functions, they may, for the purpose of the discussion of this question, be divided into municipal or public and quasi public.

There are certain municipal corporations so well defined as to leave no opportunity for question as to their nature. These are the constitutional civil divisions, viz.—counties, towns, cities and villages. It is evident that the institution under discussion could in no manner be held to fall within any of these classes of municipal corporations. There is no hint anywhere in the statutes affecting it that it was intended to be incorporated as a city or village. It is true that like all areas of congested population it has been necessary to provide a system of sanitary control which resembles those of cities and villages. This is also true of its lighting and heating facilities and other allied local community interests; but assuming that it had by direct grant all the powers and rights of a legal municipality, still it would be an unconstitutional body.

People ex rel. Yost v. Becker, 203 N. Y. 201.

The question before the court in that case was the validity of the commitment of the relator by a police justice "of the Area or Territory of Sylvan Beach, N. Y." The court set out in considerable detail the acts fixing the character of said area or territory and after discussing the several statutes state that a legal municipal corporation was created unless the Legislature was restrained by the constitution from instituting it. At page 208 of the opinion, Judge Collin, writing, says:

"We hold that the adoption by the constitution of counties, towns, cities and villages as the civil divisions exercising general powers of local government and the local auxiliaries of the state government is equivalent to a direct prohibition against the creation of other civil divisions vested with similar powers."

And again at page 209,—

"It is an element essential in the incorporation of a county, town, city or village that it be incorporated by expressed classification a county, or a town, or a city, or a village. The legislature must, in order that our political system have orderly and intended operation, give to a body corporate having general powers of local government a classification or denomination and thereby fix its proper place in the governmental machinery. The body at the bar it denominated 'area or territory,' and in case we amended it to a village or city, or deemed it thus amended, we would perform a legislative and not a judicial act."

The court held the acts, purporting to incorporate the area, unconstitutional and void.

For the reasons stated there it is clear that Chautauqua Institution is not a legal municipal corporation coming within the constitutional civil divisions. There has been no attempt to constitute it as such, and if there had, such attempt must have failed since there has been no denomination of it as one of the divisions authorized by the constitution.

Let us now recur to the definition of a municipal corporation in the General Corporation Law. It includes, in addition to the civil divisions above referred to, a school district and "any other territorial division of the State established by law with powers of local government." Undoubtedly a school district, even if not included in the definition is a quasi corporation of very limited powers. (*Harris v. School Dist. No. 10*, 28 N. H. 62; *Union Free School Dist. v. Village of Glen Park*, 109 A. D. 414; *Barnes v. District of Columbia*, 91 U. S. 540.) But no argument occurs to me which would bring the present corporation within such a classification. and I, therefore, disregard it. There is, however, some question as to the comprehensiveness of the term last above quoted as well as in connection with the true meaning of the term "other political subdivision," and "other subdivision" as used in the Compensation Law. In the Becker case counsel for the respondent argued that the area of Sylvan Beach was legally incorporated under the provisions of the General Corporation Law as a territorial division of the State. The court said this argument required no consideration.

There are several cases in the books holding that there are municipal corporations without the strict classification set forth in the Becker case.

Cook v. Port of Portland, 20 Oreg. 580; 13 L. R. A. 533.

People v. Draper, 15 N. Y. 532.

Barnes v. District of Columbia, 91 U. S. 540.

The Becker case did not decide that there could be no other municipal corporations than those therein set forth. It held that the attempt to incorporate a civil division with the powers similar to a city or village failed because of improper denomination. A city or village could be incorporated in only one way and that method had not been followed. It was therefore unnecessary to consider the other arguments.

There is a great amount of illuminating discussion in the opinion in the case of *Dartmouth College v. Woodward*, 4 Wheaton, 518, on the essential attributes of corporations, similar to the one here under discussion.

Mr. Justice Storey, (p. 668), points out very clearly that the nature of the work of the institution has no relation to the question of whether a corporation is a public one or not. At page 671 he says:

“The fact, then, that the charity is public, affords no proof that the corporation is also public; and, consequently, the argument, so far as it is built on this foundation, falls to the ground. If, indeed, the argument were correct, it would follow, that almost every hospital and college would be a public corporation; a doctrine utterly irreconcilable with the whole current of decisions since the time of Lord Coke. * * * When the corporation is said at the bar to be public, it is not merely meant, that the whole community may be the proper objects of the bounty, but that the government have the sole right, as trustees of the public interests, to regulate, control, and direct the corporation, and its funds and its franchises, at its own good will and pleasure. Now, such an authority does not exist in the government, except where the corporation is in the strictest sense public; that is, where its whole interests and franchises are the exclusive property and domain of the government itself.”

To the same effect see *Regents v. Williams*, 9 Gill and Johnson 365; 31 Am Dec. 72. So here, the fact that Chautauqua Institution is engaged in a work public in its nature, casts no light upon the question at hand and has no bearing upon the inquiry

as to whether such institution is a municipal corporation or not. The following extract from Mr. Justice Bradley's opinion in the case of *Mayor, etc., v. Ray*, 19 Wall. 468, is quoted with approval in *Wells v. Town of Salina*, 119 N. Y. 280, at page 295:

"A municipal corporation is a subordinate branch of the domestic government of a state. It is instituted for public purposes only, and has none of the peculiar qualities and characteristics of a trading corporation instituted for purposes of private gain, except that of acting in a corporate capacity. Its objects, its responsibilities and its powers are different. As a local governmental institution it exists for the benefit of the people within its corporate limits. The legislature invests it with such powers as it deems adequate to the ends to be accomplished."

In *MacMullen v. City of Middletown*, 187 N. Y. 37, at page 41, it is said:

"A municipal corporation is a political or governmental agency of the state which has been constituted for the local government of the territorial division described and which exercises, by declaration, a portion of the sovereign power for the public good."

And again, at page 43:

"These principles are familiar from their frequent statement in the books and their brief summary here is to emphasize the idea that a municipal corporation is but a part of the machinery of government; that it is the creation of the legislature, which endows it with certain local governmental functions and imposes upon it the performance of certain duties, and that its every feature is subject to the regulation of the legislature in granting the charter and to the right of that body to change, or to modify, as the public interest may demand."

In an Illinois case, the *People v. Trustees of Schools*, 78 Ill. 136, it was held that school townships as constituted by the General School Law were not municipal corporations in nature or purpose. Article IX, section 5, of the Illinois Constitution provided:

"The corporate authorities of counties, townships, school districts, cities, towns and villages, may be invested with power to assess and collect taxes for corporate purposes."

The question before the court was whether this section authorized school townships to incur a debt, and having contracted the same, levy and collect taxes to pay it. Mr. Justice Walker held that they were not created to exercise any of the functions of government and hence were not municipal corporations nor were they provided with the officers or power to exercise governmental functions. He contrasts them with cities and towns and states that the latter were created and maintained to aid in the government of the people. He says, page 139: The constitution makers when they used the language, "for corporate purposes", supposed that if any question arose in the construction of the clause, the department of state, applying its principles, would determine the real object of the creation of the body and limit it to that purpose. "They did not, on the one hand, expect that there would be an effort to push the construction to the extent that it would embrace all purposes which might by possibility be brought in the corporate power."

At page 141 he says:

"If, because a municipal corporation, created for governmental purposes, may be invested with such powers, it does not follow that some other body, having some of the attributes of a municipal corporation, may be."

I think it is clear that the state may delegate certain municipal powers to its citizens without constituting them, by such delegation, municipal corporations. There seems to be no plausible reason that could be advanced in support of the theory that the charter of incorporation of the institution, as originally granted, created a municipality. If it is now a municipal corporation, for any purpose, it is because of the various statutes passed dealing with the activities incidental to its broadening growth and expansion. Generally speaking, its members and guests are liable to the town and county laws just as in any other section. It has no statutory territorial limitations or boundaries. It maintains no courts, elects no administrative officers by vote of the people and has no jurisdiction to punish criminals. The basis of representation for governing the institution is determined not by the citizenship of the voter, but upon the question of whether he is a member or not, and that, in turn, is governed by an arbitrary rule of selection based upon ownership of land or the accident of being one of the persons named in the original or supplemental certificate of incorporation or election to membership by the trust-

tees. It is true that the corporation has by special statutes some rights delegated to it which savor of the municipal element. Witness the act creating it a separate health district.

The court in the case in 78 Illinois referred to above, construed a constitutional provision of a similar nature to the question here involved and held that a reasonable rule must be applied.

It may very well be said that, in defining the term "municipal corporation" in the General Corporation Law, as well as in the Workmen's Compensation Law, the Legislature to paraphrase the court's statement in the Illinois case cited above, did not expect that there would be an effort to push the construction of such definitions to embrace all cases which might by possibility be brought within the meaning of the term.

To follow the analogy further, it is, apparently, also true that "because a municipal corporation, created for governmental purposes may be invested with such powers, it does not follow that some other body, having some of the attributes of a municipal corporation", is one.

It cannot be possible that the Legislature intended to include, within the definitions in the General Corporation Law and the Workmen's Compensation Law, above referred to, all corporations, of whatsoever kind, that might be carrying on, as an incident to their main purpose, any activity, which is common to municipalities.

It must be that we are allowed to examine into all the facts in each case to determine in which class a corporation belongs, any other theory would impute to the legislature an intent foreign to the general principles of law. It is conceded as a matter of course, that where the Legislature has spoken unequivocally, there can be no argument over its *dictum*, but a too literal construction of this definition would be subversive of our ideas of municipal corporations. A municipal corporation is simply an arm or agency of the State established for governmental purposes in some certain locality. It is a trustee for the whole state of its property and powers.

It has already been demonstrated that Chautauqua could not have been constituted a municipal corporation proper and if it is a public corporation within the definition, it must be a quasi corporation. These are defined as governmental agencies created solely to administer the general State laws. They are involuntary organizations imposed by the State without considering the wishes of the community. They are not chartered and

clothed with documentary evidence of authority like a full corporation and have no incidental powers or inherent corporation attributes.

28 Cyc. 132, and cases cited.

Measured by this rule the institution is not a *quasi* public corporation.

Suppose the Legislature passed a law repealing the act which created the institution a separate local health unit. The rules and regulations now in force would still have to be enforced practically as they are today and just as they would be if the project were being carried on by an individual. Would the corporation be any more or less a municipality by reason of such repeal? The local regulations and control, necessitated by the activities and magnitude of the project, are incidental to the main purposes of the corporation and are no different than those of any large institution privately endowed and supported. The fact that its management has been facilitated by special laws could not change the nature of the corporation itself. The regulation of its activities would have to be carried on if the special laws were repealed. As well say that a private college, hospital or individual activity becomes a municipal corporation within the meaning of the compensation act as soon as the internal affairs thereof require sanitary, police and health regulations. To hold that this institution is a municipal corporation would be equivalent to including within the term practically every form of activity where any considerable number of people are gathered in one locality with the resulting need for local sanitary and police protection. The corporation has by charter no delegation of governmental powers except those necessary to the control of its private business. The grants of *quasi* public rights by special statutes could not change the whole purpose of its creation. To be a municipal corporation it must have been created primarily and essentially for governmental purposes. We have seen that such attributes of a public or municipal character as it has have been incidental to its other and avowed purposes.

The various special acts, authorizing a sewage system, creating it a separate health district, etc., could not have changed it from an eleemosynary to a municipal institution. That would, in effect, be accomplishing by implication and indirection what the constitution has prohibited being done directly, namely, insti-

tuting a municipal corporation without denominating it as such. *People ex rel Hon Yost v. Becker*, cited above. It would be more reasonable to infer that these acts created a separate municipal corporation in each case. This, I believe, is untenable.

Let us now consider the question whether it is an employer of labor for pecuniary gain within the statutory definition.

The handbook of information issued by the institution states that the institution is carefully administered to keep the annual expenditures safely within the budget. That with the exception of panic years there is a surplus which is devoted to plant renewals and improvements. That it is dependent upon its friends for contributions and endowments to make expansion. It states: "No stockholders are drawing dividends from Chautauqua. No large salaries are paid." All receipts, income from various sources, such as endowments, fees charged for admission at the gates, tuition fees, etc., are applied to carrying on and expanding the work. Its avowed purpose is the carrying on of educational and religious work.

The facts at hand indicate that there are various enterprises carried on within and about the grounds of the corporation, which, if directed and managed by it directly would undoubtedly make it an employer of labor for pecuniary gain within the meaning of the statute.

Information furnished by counsel for the institution, however, shows that the business enterprises referred to are not carried on by the corporation but by private interests. He says:

"The lumber yard is located outside of the grounds and is conducted by Harman Farr as a private enterprise. The blacksmith shop is in the same class. Various stores are run as concessions by private persons. For instance, the institution owns the building, a part of which is occupied by the Clarke Baking Company of this city, the company paying a fee for the concession which covers the rent of the building. The company agrees to carry sufficient stock of baked goods to meet the demand, not to charge excessive prices, and all profits belong to the Baking Company. This arrangement is similar to that carried out in the other cases."

It must be determined whether the institution, by granting leases and concessions to persons conducting independent business activities and accepting rent therefrom, becomes an employer for pecuniary gain.

In a recent case, *Castor v. Collegiate Baptist Church*, (not yet reported), one of the disputed questions was whether the defendant was an employer of labor for pecuniary gain in renting and conducting a loft building, which it owned, for factory purposes.

Castor, an elevator conductor in said building in the employment of the church, was injured in the course of his employment and subsequently died as a result thereof. The State Industrial Commission held that the church was an employer within the statute and made an award to the widow. Commissioner Boyle, writing for the Commission, says:

“There is nothing whatsoever to differentiate the business of this employer from that of any other conducting a building rented for business or manufacturing purposes.”

It is significant that the defendant was in actual charge of and was “conducting” the building. The Appellate Division affirmed without opinion.

In *Uhl v. Hartwood Club*, 177 A. D., 41; 163 N. Y. S., 744; affirmed 221 N. Y., 588, it appeared that the defendant was a membership corporation organized to acquire land, ponds and streams of water for a fishing and hunting preserve and as a pleasure resort for its members. It sold cottage sites, had the right to erect and maintain a club house and the powers incidental to said purposes. It acquired 6,000 acres of land mostly timber. From this tract it sold lumber, railroad ties, telegraph poles and firewood. The cutting was carried on by club employees throughout the greater part of the year and the profits went into the club treasury and in some cases was paid to members as dividends. One of the club employees was killed while engaged in cutting timber and upon the application of the widow for an award under the Workmen's Compensation Act, the question arose whether the club was estopped to plead that it had no right to engage in the particular business in which Uhl was killed, for pecuniary gain.

The Appellate Division (Judge Woodward dissenting), held that the club could not defend on the ground that the occupation of decedent was *ultra vires*.

In the Court of Appeals it was said that whether or not a club or individual was engaged in forestry for pecuniary gain was a question of degree. In a memorandum opinion, page 589, they say:

"But where the owner of a large tract of woodland cuts and sells the lumber upon it regularly, although that work may be incidental to his main business, he comes within the definition of the statute."

The question came up for consideration in *Vine v. West End Presbyterian Church*, 190 A. D., 886. Vine, a carpenter, employed by the church, was injured while engaged in his work. All interested parties agreed upon a settlement by which the injured workman received compensation for thirty-two weeks. Subsequently and on April 16, 1917, the Commission terminated the agreement and closed the case on the ground that the church was not conducting a business for pecuniary gain and, therefore, was not under the Compensation Law.

Subsequently application was made to reopen the case and to enforce the agreement. Commissioner Sayre in his opinion states that the principal question is whether an employer conducting a hazardous occupation but not operating for pecuniary gain may be held under the Compensation Law where he has agreed to pay compensation and the same has been accepted by an employee for a long period and no appeal has been taken from the decision of the Commission approving the agreement.

He also states that the church could avail itself of the defense that it was not an employer conducting a business for pecuniary gain but neither the employer nor the insurance carrier made such defense. The approval of the agreement by the Commission was in effect an award and no appeal having been taken within thirty days said agreement continued in force. He then discusses the jurisdiction of the Commission to terminate the agreement and holds that they have the right to set aside their order terminating it and decides that compensation should be awarded to date and the case continued for consideration of future disability.

An appeal was taken from this decision to the Appellate Division (190 A. D. 886), and that court reversed the award and dismissed the claim without opinion which was in effect holding that the defense that the employer was not engaged in business for pecuniary gain was a valid defense and the church was not estopped to plead it at any time.

In the case of *Francisco v. Oakland Golf Club*, 193 A. D. 573, it appeared that one Francisco was a cook employed by defendant, a membership corporation. It maintained a restaurant on the *a la carte* plan for members and their guests. While at work cook-

ing a chicken in the kitchen of the restaurant he was fatally burned. His widow made a claim for compensation. The State Industrial Commission made an award in her favor and an appeal was taken to the Appellate Division. That court reversed the award and dismissed the claim. The opinion, written by Mr. Justice H. T. Kellogg, at page 574, says:

"The club was maintained exclusively for social purposes and to provide members with opportunities to engage in the game of golf and other outdoor sports. It was supported by annual dues paid by members, and was not engaged in any business enterprise whatsoever. Even its restaurant, which was operated to promote the social activities of the club, was so conducted that its yearly disbursements for maintenance exceeded its yearly receipts. No dividends were distributed by the club to its members, nor was it within the contemplation of its organizers or members that dividends should ever be paid. It is entirely clear, therefore, that the deceased employee was not employed in a trade, business or occupation carried on by his employer for pecuniary gain within the meaning of subdivision 5 of section 8 of the Workmen's Compensation Law."

It is apparent from the examination of the above authorities that a corporation such as Chautauqua could engage in a business enterprise for pecuniary gain within the meaning of the Compensation Law. All authorities consulted, however, holding institutions liable under the act, where they were not primarily organized and carried on for private business purposes, have been those where the employers had direct charge and supervision of the work. It is clear that a club or institution cannot directly engage in or carry on a private enterprise for profit and thereafter when an injured employee makes a claim for compensation under the act, avoid liability by pleading that it had no authority to engage in such business. See cases cited above.

It is plain that, as to the employees of the business enterprises carried on at Chautauqua by lessees or holders of concessions from the institution and of which it does not have the direct conduct and direction, it would not be liable under the Compensation Law. Such employees are not its employees. It is also equally clear that if any of its business activities are, in fact, directly within its management and control and operated for pecuniary gain, and otherwise within the statutory description, as to these,

it is clearly within the purview of the act and liable the same as any other employer.

It should also be noted that, if it conducts any enterprises falling within the class last above set forth, the patrolmen and possibly others of its employees, under the law as stated in *James v. Witherbee-Sherman & Co., Inc.*, 2 State Department Reports, 483, would properly fall within the protected class.

Of course, there can be no question about the liability of the employers who operate the various independent enterprises. Assuming that their employees come within any of the classes designated as hazardous in the statute, they are clearly within the act.

Since Chautauqua is clearly within the constitutional inhibition preventing its creation as a full municipal corporation and, for the reasons herein stated, cannot be held to be *quasi* public in its powers, I conclude that it does not fall within any of the classes set forth in Group 43 of section 2 of the act. As to the remaining question, whether it is included within the classification of corporations carrying on business for pecuniary gain as defined by the Workmen's Compensation Act, I am satisfied that, so far as any business activity is concerned, which is carried on through concessions or leases and by independent management, and from which the institution simply receives rents without sharing in the direct conduct or profits of the same, it is not.

This conclusion, however, must be qualified by the statement that, if there are any business enterprises carried on by its employees for gain and coming within the classes of hazardous employments enumerated in the act, the receipts of which go directly into the corporation's treasury, as to such employment of labor it is within the Compensation Act. And assuming such a state of facts other employees, as, for example, the local policemen paid by the institution, might also be brought within the operation of the act.

I am of the opinion that Chautauqua Institution, except as the rule is qualified above, is not covered by the provisions of the Workmen's Compensation Law.

Dated April 16, 1921.

CHARLES D. NEWTON,
Attorney-General.

By THOS. F. FENNELL,
First Deputy.

TO WILSON C. PRICE, Esq., Jamestown, N. Y.

CONSTRUCTION OF COVENANTS IN DEED BY WILLIAM SEWARD WEBB AND ANOTHER TO THE PEOPLE OF THE STATE OF NEW YORK, DATED JANUARY 16, 1896, RECORDED IN HERKIMER COUNTY CLERK'S OFFICE FEBRUARY 1, 1896, IN LIBER 157 OF CONVEYANCES AT PAGE 482.

The execution of an agreement providing for cutting the timber on a tract of land subject to the covenants in said deed and subsequently reforesting the same would be a violation of said covenants.

INQUIRIES

1. Is the proposed agreement between the Champlain Realty Company and the People of the State of New York, dealing with the covenants set forth in a deed dated January 16, 1896, and recorded in Herkimer county clerk's office, February 1, 1896, in Liber 157 of Conveyances at page 482 by William Seward Webb and the Ne-ha-sa-ne Park Association to the People of the State of New York, in violation of the covenants in said deed?

2. If not in violation of said covenants has the Conservation Commissioner authority to execute the same on behalf of the People of the State of New York?

OPINION

By a deed dated January 16, 1896, and recorded February 1, 1896, in Liber 157 of Conveyances at page 482 in the Herkimer county clerk's office, William Seward Webb and the Ne-ha-sa-ne Park Association conveyed to the People of the State of New York about 75,000 acres of land within the bounds of the forest preserve. About 15,000 acres of this tract was located in Township 8 of John Brown's Tract. The grantors owned other lands in said Township 8 and, in their deed to the State, covenanted, among other things, that none of the remaining lands in Township 8 belonging to said grantors which had not been theretofore contracted by them to be sold, "shall be used or sold for commercial-agricultural, manufacturing or other purposes, except as mentioned in said Thompson contracts, but the same shall by the parties of the first part, their heirs and assigns be used and sold exclusively for permanent forestry, hotel, camp and cottage purposes," and that all deeds thereafter to be given by either of said grantors should contain a clause binding the purchaser thereof, his heirs and assigns to a perpetual use of said lands for permanent forestry, hotel, camp and cottage purposes."

By an inquiry from the Conservation Commission it appears that the Champlain Realty Company is now the owner through *mesne* conveyances of about 40 acres of the remaining land which it is conceded is subject to the covenants referred to and, in part, set forth above.

Said Champlain Realty Company has submitted to the State an agreement affecting said covenants already executed by said corporation and has asked that the State through its Conservation Commissioner, execute the same.

This agreement which is dated April 30, 1921, recites the ownership of the said 40-acre parcel on the part of the company, that said parcel is subject to the covenant "that the same (i. e. the land) shall be used and sold exclusively for permanent forestry, hotel, camp and cottage purposes," and further recites and provides:

"Whereas, It is the purpose and intent of the party of the first part to comply with the terms of said restricted covenant by using the said land for permanent forestry purposes by removing the present forest growth thereon effecting a close utilization of timber thereon for firewood and other proper purpose in conformity with the conservation law and reforesting the same at the proper time. Now, Therefore this Agreement.

Witnesseth: That the party of the first part in consideration of the premises and of one dollar in hand paid hereby covenants and agrees with the parties of the second part that it will at its own proper cost as soon as practicable after the removal of the forest growth on said land proceed to replant the same with suitable young trees to be prescribed by the Conservation Commission as to species and number per acre which are to be planted, which however shall not exceed twelve hundred per acre, and in case it neglects to so replant said land it hereby authorizes the parties of the second part through the Conservation Commission to do the same or cause it to be done and that the proper expense thereof shall become and be a lien on the land. The party of the first part covenants and agrees to pay for any and all proper expenses incurred by the parties of the second part in replanting said land or any part thereof, within thirty (30) days after demand therefor by the Conservation Commission. The party of the first part hereby covenants and agrees that this agreement and the covenants herein shall bind the land and run therewith."

The Conservation Commissioner states that the parcel of land in question adjoins the New York Central Railroad near Big Moose station, and that there is now and has for many years been a siding for loading logs and wood upon said parcel. He also states, that a part of the land is covered with mixed hard and soft

wood forest, and that the company claims that it will be necessary to clear some of this land in connection with their lumbering on adjacent land, and that in so doing they will thoroughly utilize the trees cut using them locally for firewood and thus reduce the fire risk.

With these facts as a basis the two inquiries above set forth are submitted for determination.

Without deciding the question as to the authority of the State to enter into the proposed agreement, it occurs to me in passing, to inquire as to the desirability or utility of entering into any form of agreement of the kind presented.

The deed with its covenants is a contract binding upon both parties. The proposed agreement can be nothing other than an attempt to change or construe the original covenants. The Supreme Court in the case of *People v. Thistlethwaite*, 134 A. D. 876, have construed the covenants sufficiently, it seems, for the purposes here set forth. But assuming that such is not the case what will prevent another agreement changing or construing the present proposed contract and so on, indefinitely? Why will there not be as much reason for a third or subsequent agreement as there is for the present one? The original deed with its covenants is a complete instrument and when properly construed fixes the rule to follow. Why agree what that rule is? Why enter into a new contract for the purpose of carrying out one which is complete in itself?

I do not understand that there is any desire on the part of the State to limit the effect of the covenants. Assuming that this is a fact, if the Conservation Commissioner has no power to execute the proposed contract, nothing will be accomplished as the State would not be bound by the unauthorized act of one of its officials, and if he has the authority he can only do one of two things; limit the effect of the covenants, which I do not understand is in contemplation and which, without doubt, the remaining owners of the lands bound by said covenants could successfully resist if they cared to, or leave it as it is at present. Either result leaves nothing accomplished. The agreement will only define the covenants by their own terms and limitations.

As the effect of the covenants has been well considered and the rule for their construction clearly laid down in the *Thistlethwaite* case above referred to, the question of the advisability or authority for the execution of the proposed contract is not passed upon, but the matter will be disposed of on the ground of its relation to the covenants.

In the above case, which was unanimously affirmed by the Appellate Division upon the opinion of the referee in the court below, it appears that the defendant, Thistlethwaite, had secured title to a parcel of land subject to the covenants herein discussed, and that he subsequently made an agreement with the Hinckley Fibre Company, by which he agreed to sell therefrom certain grades of hard and soft timber of specified dimensions. Pursuant to this contract, the Hinckley Fibre Company commenced to cut timber, but subsequently stopped at the instance of the Attorney-General. Later upon the direction of the Attorney-General it was allowed to go on with the cutting of the soft wood, but was directed to leave the hard timber. The cutting continued under this authorization until the beginning of the action in March, 1907.

The plaintiffs claimed the cutting was not allowable under the restrictive covenants and asked for injunctive relief.

The defendants denied the violation of the covenants and claimed that the sale to the Hinckley Fibre Company was permissible by way of preparation of the tract for use and sale for hotel, camp and cottage purposes.

The chief factor in seeking the real meaning of a covenant is to determine, if possible, the intent of the parties thereto. At page 878 of the opinion in the above case appears the following:

“The policy of the State was to have a preserve of wild forest lands. The restrictive covenants did not go so far, but imposed limitations upon what would otherwise be the ordinary use as then understood.

By the Law as it then existed, the Forest Commission was charged with the duty of protecting the forests in the forest preserve. It had charge of the public interests of the State with regard to forestry and tree planting, and especially with reference to forest fires, and was charged with certain duties in the promotion of an interest in behalf of forestry in the schools of the State. (Laws of 1895, chap. 395, § 271.) It may, I think, be assumed that the Forest Commission in the discharge of its duty to the interests of the State obtained the covenant in question. It is somewhat peculiar in form. It first provides as to what shall not be done and then provides as to what shall exclusively be done. Effect must be given, if possible, to both of these provisions.”

The court held that both the negative and affirmative covenants must be given effect and that one did not override and nullify the other.

It was further held that the operation of the covenants was to prohibit all commercial sales or uses and the opinion continues "and that, I think was the intention of the parties."

Conclusion of law number 5 was to the effect that the acts committed by defendants were not a use of said land for permanent forestry, hotel, camp or cottage purposes within the meaning of the covenants and agreement.

It should be borne in mind that the criterion by which the terms of the covenants are to be construed is not that commonly applied but that which must be held to apply under the particular circumstances existing when the deed was made. What these circumstances, which were controlling at the time of drafting the covenants, were, has been stated in the opinion of the court at page 878.

Clearly the State had in mind the keeping of the tract adjoining the forest preserve in a condition as similar to the State forests as possible. As an illustration of the attitude of the State toward the forest preserve I quote from an opinion of this office rendered to the Conservation Commission on or about April 7, 1920, in connection with a request for a ruling as to the right of the State Highway Commission to allow contractors to remove stone from forest preserve land:

"The idea of the protection of the forest preserve goes not only to the protection of wild game, control of water supply, rain fall, temperature, timber, etc., but also to the creation and maintenance of a healthful play ground and recreation place with the attributes of a wild forest park as distinguished from the more or less familiar urban parks so common throughout the country. The preserve should not only have its timber supply jealously protected but every effort should be made to have it retain the *character* of wild forest lands which means much more than simply the protection of the trees thereon.

When the constitution says it shall be 'forever kept as wild forest lands,' I think it means wild forest with all the significance the term bears. The removal of the face of a bluff or rock in a specific case might not to any great degree trench upon the general theory of retention of the preserve as wild land, but it would seem to be a step in the wrong direction, a move toward commercialization instead of toward preservation and might become the opening wedge

to other and greater infractions of the strict rule so long considered controlling. It would become a precedent by which future conduct and opinions would be more or less influenced and controlled."

It must be that the covenants in the deed here discussed were drawn with ideas similiar to the above paramount in the minds of the parties. The State in dealing with its forest lands has always attempted to keep as far as possible from any tendency toward commercialization.

The present proposed action contemplates the removal of the present forest growth as stated for "permanent forestry purposes." Attention is here called to page 880 of the opinion in the case cited above. It is there stated:

"Can it properly be said that in the preparation of lots for sale the negative covenant can be disregarded? *Such a preparation may be convenient, but it is not shown to be a matter of necessity.*

A great many trees are left upon the premises, enough it may be to constitute a forest. *That, however, is not the question here, but it is whether, in the exercise of the right to use and sell the lands for camp and cottage purposes, the grantee has the right to use and sell his lands for a purpose expressly forbidden.*"

Applying that rule to the present case can it be said that the removal of the timber as proposed is necessary for the avowed purpose, *i. e.*, the utilization of the tract for permanent forestry? As stated above the inquiry herein to some extent emphasized the *necessity* of the siding for loading logs and that it is *necessary* to clear some of the land in connection with lumbering operations on adjacent land. The "necessity" contemplated by the court is not necessity, as construed from the owners' standpoint, to save them trouble or to allow them to dispose of the timber, but is the necessity that requires the step to be taken as an essential and indispensable move in the preparation and furtherance of "permanent forestry" on the parcel in question within the intent of the covenant.

Under the claim of necessity as set forth and pursuant to the agreement as drawn and presented the whole tract affected by the covenant could be cut over under the guise of "permanent forestry." The only "necessity" the State should take cogniz-

ance of is that predicated upon the carrying out of the covenants. This is not concerned with the convenience of the company. It owns a parcel burdened with the covenants which do not allow a commercial use of the land.

The covenants provide what purposes it may be used for and also state those purposes for which it may not be utilized. The adaptation of it to commercial uses is expressly forbidden. There seems to be no attempt to disguise the fact that the proposed changes are in furtherance of the lumbering operations of said company. They are undoubtedly a violation of the covenants.

Permanent forestry in the commercial sense is one thing but here, as is pointed out in the Thistlewaite case, it is altogether a different matter. Without determining what "permanent forestry" is, it may be said that, as used in the covenants and interpreted by the court, it is not the cutting over of this or any other of the lands affected and either reforestation or allowing the State to do the same. Here as in the above case the question is has the present owner the right to cut over the tract and use the timber for a forbidden purpose, *i. e.*, for or in aid of a commercial purpose under a promise to reforest the same. As already stated to lay down such a rule would allow the denuding of the whole tract affected by the covenant.

Whether or not this is practical forestry it is not the "permanent forestry" contemplated by the covenant.

The opinion in the case cited is controlling and I am, therefore, bound to say in answer to your first question that, irrespective of the advisability or authority for executing the agreement, to do so would be a violation of the covenants.

This conclusion renders an answer to your second question unnecessary.

Dated June 15, 1921.

CHARLES D. NEWTON,
Attorney-General.

By E. J. LAKE,
Deputy.

To E. J. STALEY, *Conservation Commissioner.*

POLICE POWER — LEGISLATURE MAY REGULATE CUTTING TREES ON PRIVATELY OWNED LANDS.

1. The Legislature may, under the police power of the state, regulate the cutting of trees on privately owned lands, provided, upon sufficient proof, it appears an emergency affecting, or tending to affect, the health, comfort, morals or welfare of the people, or of any considerable part of the people exists.

2. The legislation effecting such regulation must be reasonable, non-discriminative, affecting all of the same class alike, and adapted to meet the emergency sought to be relieved.

INQUIRY

Has the Legislature, under the police power of the State, constitutional authority to regulate the cutting of trees upon privately owned land?

OPINION

You have requested my opinion upon the extent of the constitutional authority of the Legislature, in the exercise of the police power of the State, to regulate the cutting of trees on privately owned land.

Your inquiry involves the constantly recurring conflict between present private property as such rights have grown to be regarded, and the public welfare, present and future, as changing social and economic conditions constrain many to consider the ever increasing demands of a rapidly growing population. Your inquiry necessarily involves the question whether forest destruction has yet advanced to that degree of spoliation and public detriment that the Legislature would be justified in extending the broad police power of the sovereign to the limitation of men's method of cutting trees on their own lands and for perfectly legal and proper purposes, that is primarily a question for the Legislature to decide, for only upon such determination by the Legislature based on sufficient proof can such legislation be justified.

In view of the fact that this attribute of government is not fixed; but adapts itself to constantly changing conditions, even as society, its organization, its methods, its circumstances change, an answer to your inquiry involves as much the foresight of a seer as the research and deliberation of a lawyer. Especially is this so, as our courts have recognized the necessity of measuring the validity of such statutes by the demands of the times, rather than by the rigidity of written constitutions. They have held a law an unconstitutional attempt to exercise the police power, and a few years later a similar enactment, valid because of circumstances arising since the first decision, or of evidence of critical conditions existing at the time of the prior determination but not then brought to the attention of the court.

A striking example of such divergent decisions presents itself in the cases of *People v. Williams*, 189 N. Y. 131, decided in 1907, and *People v. Charles Schweinler Press*, 214 N. Y. 395, decided in 1915. In the *Williams* case a statute of 1903, forbidding the employment of adult women in factories before six o'clock in the morning and after nine o'clock in the evening was held inimical to the constitutional provisions guaranteeing to every citizen freedom of lawful employment, and as discriminative against female citizens in denying them equal rights with men. The opinion in the second case asserts that while the statutes in both cases are not substantially different in purpose, yet the two cases may be really and substantially differentiated, and says:

"So, as it seems to me, in view of the incomplete manner in which the important question underlying this statute — the danger to women of night work in factories — was presented to us in the *Williams* case, we ought not to regard its decision as any bar to a consideration of the present statute in the light of all the facts and arguments now presented to us and many of which are in addition to those formerly presented, not only as a matter of mere presentation, but because they have been developed by study and investigation during the years which have intervened since the *Williams* decision was made. There is no reason why we should be reluctant to give effect to new and additional knowledge upon such a subject as this even if it did lead us to take a different view of such a vastly important question as that of public health or disease than formerly prevailed. Particularly do I feel that we should give serious consideration and great weight to the fact that the present legislation is based upon and sustained by an investigation by the legislature deliberately and carefully made through an agency of its own creation, the present factory investigating commission."

Thus it is manifest that the necessary consideration of existing, or seriously apprehended exigencies, rather than adjudicated precedents, renders the more uncertain and unsatisfactory an opinion on the constitutional validity of prospective legislation involving the exercise of the police power.

Attempts have been made to define the police power. But almost as often as judges have resorted to definitions of this function of government, they have admitted the difficulty, if not the impossibility, of correct and comprehensive delineation and have

turned to explanation and example. However, from a few of the well nigh innumerable judicial opinions — few if any, subjects of the law have been so widely and frequently discussed — it can be gleaned that it is possessed by every sovereign state (*In re Jacobs*, 98 N. Y. 98) is inherent in the states of the American Union (*People v. Budd*, 117 N. Y. 1), and it is determined as each case presents itself whether there the power was properly invoked. It rests to a large extent on those ancient maxims of the law: “So to use your own that you will not injure another,” and “The safety of the people is the supreme law,” and the vital principles of both must be regarded and enforced.

Usually when occasion arises for assailing a specific exercise of the police power, those who believe their rights or property invaded and hence seek to overturn the law so effecting such result, invoke the fourteenth amendment to the Federal Constitution and kindred provisions in the constitutions of the states. Such provisions declare that no State, “shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.” Considering the effect of such constitutional guarantees, Judge Field, in *Barbier v. Connolly*, 113 U. S. 27, significantly observes:

“But neither the amendment — broad and comprehensive as it is — nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to *increase the industries of the State, develop its resources, and add to its wealth and prosperity.*”

I have directed attention to the adherence of the courts to the determination of the necessity and legal propriety of the use of the police power in each case as it is presented. Your inquiry can be illumined and mainly answered by presenting some cases, both in this State and elsewhere, in which this power has been invoked to limit and restrain the owner in the use of his own property on his own land, for the avowed purpose of promoting the welfare of the community or a considerable part thereof.

In Indiana, the Legislature had declared by act that “the use of natural gas for illuminating purposes in what are known as flambeau lights, is a wasteful and extravagant use thereof, and is dangerous to the public good.” The statute then forbade such use of natural gas and made the violation of the prohibition a

misdeemeanor. The same law also prohibited the burning of the lights which might be legally used between 8 a. m. and 5 p. m. That act was upheld as a valid exercise of the police power and as properly invoked to conserve the gas supply of the State. (*Townsend v. State*, 147 Ind. 624; 49 N. E. 19.) It should be observed, however, that the court looked upon such gas as similar in character to fish and game, in that it came from a common reservoir underlying the lands of other persons than the defendant, each of whom had equal right with him to draw upon such supply, and any particular portion of such accumulation was not the property of any particular person until reduced to possession by him. Hence, as the court there said, one, tapping the common supply, could be so restricted as not to impair an equal right in others.

Following the principle enunciated in the Indiana case, the Court of Appeals in this State in *Hathorn v. Natural Carbonic Gas Co.*, 194 N. Y. 326. upheld an act of our Legislature prohibiting the drilling in a specified locality into the rock for the purpose of extracting therefrom by artificial means water impregnated with minerals and containing in solution a high percentage of carbonic acid gas, for the purpose of separating such gas from the water and vending it separate from the water. Here, as in the Indiana case, the court seemed mainly to consider that such water was drawn from a common supply and that a law prohibiting the taking of that water by such methods and in such quantities as to impair the equal rights of others was a valid legislative act.

The United States Supreme Court in *Lindsley v. Natural Carbonic Gas Co.*, 220 N. Y. 61, approves the position of the State court with respect to its holding on the so-called anti-pumping law. In this case the contention having been made that the statute was invalid in that it indulged in unfair and inequitable classification, and hence discrimination, the court laid down the following rules with respect to the police power as applicable in that case and which are generally applicable to all attempts at such legislation:

“The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is

purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Bachtel v. Wilson*, 204 U. S. 36, 41; *Louisville & Nashville R. R. Co. v. Melton*, 218 U. S. 36; *Ozan Lumber Co. v. Union County Bank*, 207 U. S. 251, 256; *Munn v. Illinois*, 94 U. S. 113, 132; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 615."

The State of Massachusetts in 1845 adopted a law forbidding any person to "take, carry away or remove * * *, any stones, sand or gravel from any of the beaches in the town of Chelsea", and prescribing a penalty for its violation. The defendant indicted for violating such statute did not deny the commission of the inhibited acts, but insisted that he was owner of the land from which such material was taken and that the act could not therefore apply to him, and that if it did, it was unconstitutional and void. The object of the law was obvious, to protect the harbor of the city of Boston by preserving the integrity of its beaches and natural embankments. The position of defendant was condemned, and the validity of the act sustained, (*Commonwealth v. Tewksbury*, 11 Met. 55), the court saying:

"The court are of opinion that such a law is not a taking of the property for public use, within the meaning of the constitution, but is a just and legitimate exercise of the power of the legislature to regulate and restrain such particular use of property as would be inconsistent with, or injurious to, the rights of the public."

It then refers to the disastrous effects upon Plymouth harbor of the cutting away of wood upon its beaches and the great consequent expense to both State and Federal governments of the artificial restoration of such beaches, and concludes:

"Without hazarding an opinion upon any other question, we think that a law prohibiting an owner from removing the soil composing a natural embankment to a valuable, navigable stream, port or harbor, is not such a taking, such an interference with the right and title of the owner, as to give him a constitutional right to compensation, and to render an act unconstitutional which makes no such provision, but is a just restraint of an injurious use of the property, which the Legislature have authority to make."

The reference to Plymouth Beach in this opinion, above noted, is significant in that the opinion says:

"In consequence of cutting away the wood upon it or from some other cause, it was washed away and broken through by the wind and sea, and the navigation was in danger of being wholly destroyed."

The fair inference from the opinion is that it was within the power of the State to have forbidden the cutting of shore-protecting trees as well as to prohibit the removal of sand and gravel serving the same purpose and without compensation to the owner. This case is cited in 159 U. S. 399, as illustrative of the exercise of the police power and without unfavorable criticism of its doctrine. In *Hodges v. Perine*, 24 Hun, 516, an act of the Legislature (chapter 190, Laws 1878) made it a misdemeanor for any person to remove sand or other similar material from the beach of the south shore of Staten Island opposite and contiguous to the boulevard from within twenty feet of ordinary high-water mark so as to injure such highway. An owner of land within the prohibited area sought an injunction restraining certain persons, acting under authority of this law from entering on his premises and interfering with their use, and from threatening the crews of vessels loading sand from such beach. A temporary injunction was dissolved, and the validity of the law sustained on the authority of the *Tewksbury* decision above quoted.

The latest word of our highest court upon the question of the proper exercise of the police power is found in *People ex rel. Durham Realty Corp. v. La Fetra*, 230 N. Y. 429, decided in March, 1921. Here was involved the constitutionality of the so-called "Rent Laws" of September 1920. These enactments wrought radical changes in the law of landlord and tenant, permitting the tenant to retain the use of the demised premises upon

his payment of a reasonable rent, the reasonableness of such rent being a question of fact for a jury, although the landlord might be unwilling to continue the lease for such consideration. This series of statutes also suspended the landlord's remedy by summary proceedings. The period of operation of these laws was fixed at two years; and they were passed expressly to meet the emergency of rent profiteering in the city of New York. They operated to deprive the owner of his real estate during the term of their existence, provided only compensation fixed by another, not by such owner, was paid by the occupant; and attack was made upon these laws upon the grounds that they impaired the obligations of contracts as they applied in some instances to rentals fixed by agreement before the act took effect; that they deprived the owner of his property without due process of law; that they denied to the owner equal protection of the laws and that they took private property for private use without compensation. The Court of Appeals upheld this drastic legislation upon the ground of the dire and acute emergency in the lack of dwellings for the people of congested centers of population and the advantage being taken of that situation by selfish landlords to extort exorbitant and oppressive rents.

In the prevailing opinion by Judge Pound, the basic principles governing the exercise of the police power under the recognized existing emergency was well stated as follows:

"The question comes back to what the State may do for the benefit of the community at large. Here the legislation rests on a secure foundation. (*Chicago & Alton R. R. Co. v. Tranbarger*, 238 U. S. 67, 76, 77.) The struggle to meet changing conditions through new legislation constantly goes on. The fundamental question is whether society is prepared for the change. The law of each age is ultimately what that age thinks should be the law. Decisions of the courts in conflict with legislative policy, when such decisions have been thought to be unwisely hard and stiff, have been met by constitutional amendments. * * *

The United States Supreme Court has sustained the doctrine of the *La Fetra* case in *Marcus Brown Holding Co. v. Feldman*, N. Y. Law Journal, April 23, 1921.

The expression of judicial opinion, bearing most directly on the question you propound, which I have been able to discover, occurred in the State of Maine. (*Opinion of Justices*, 103 Me.

506; 69 Atl. 627.) There, under a peculiar provision of the Constitution of that State, the Legislature could request, in advance, the opinion of the judges of the Supreme Court of that State on the constitutionality of a proposed law. Under that constitutional authorization, the Senate of Maine requested of the judges of the Supreme Judicial Court an opinion on the constitutional validity of a contemplated act; and the importance of their opinions as bearing on the matter before me, warrants some detailed attention to that inquiry and its determination.

On March 27, 1908, the Senate requested an opinion thus:

"In order to promote the common welfare of the people of Maine by preventing or diminishing injurious droughts and freshets, and by protecting, preserving, and maintaining the natural water supply of the springs, streams, ponds, and lakes and of the land, and by preventing or diminishing injurious erosion of the land and the filling up of the rivers, ponds and lakes, and as an efficient means necessary to this end, has the Legislature power under the Constitution:

(1) By public general law to regulate or restrict the cutting or destruction of trees growing on wild or uncultivated land by the owner thereof without compensation therefor to such owner?

(2) To prohibit, restrict or regulate the wanton, wasteful or unnecessary cutting or destruction of small trees growing on any wild or uncultivated land by the owner thereof, without compensation therefor to such owner, in case such small trees are of equal or greater actual value standing and remaining for their future growth than for immediate cutting, and such trees are not intended or sought to be cut for the purpose of clearing and improving such land for use or occupation in agriculture, mining, quarrying, manufacturing or business or for pleasure purposes or for a building site; or

(3) In such manner to regulate or restrict the cutting or destruction of trees growing on wild or uncultivated lands by the owners thereof as to preserve or enhance the value of such lands and trees thereon and protect and promote the interests of such owners and the common welfare of the people?

(4) Is such regulation of the control, management or use of private property a taking thereof for public uses for which compensation must be made?"

Six of the eight judges of that court joined in sustaining such power in an opinion, the vital part of which is:

“Regarding the question submitted in the light of the doctrine above stated (being that of Maine and Massachusetts at least), we do not think the proposed legislation would operate to ‘take’ private property within the inhibition of the Constitution. While it might restrict the owner of wild and uncultivated lands in his use of them, might delay his taking some of the product, might defer his anticipated profits, and even thereby might cause him some loss of profit, it would nevertheless leave him his lands, their product, and increase untouched, and without diminution of title, estate, or quantity. He would still have large measure of control and large opportunity to realize values. He might suffer delay, but not deprivation. While the use might be restricted, it would not be appropriated or ‘taken.’”

“There are two reasons of great weight for applying this strict construction of the constitutional provision to property in land: (1) Such property is not the result of productive labor, but is derived solely from the State itself, the original owner; (2) The amount of land being incapable of increase, if the owners of large tracts can waste them at will without State restriction, the State and its people may be helplessly impoverished and one great purpose of government defeated.”

From the few decisions, to which I have referred, it can be deduced that the domain of the police power is mutable coincidentally with the changes in society, that is, must appear convincingly to the court that a public emergency, present or reasonably anticipative, exists that demands a remedy not available without curtailing usually recognized private rights of property or action, that the restrictions or limitations placed upon individuals apply equally to all within the same prescribed class or classes, and that the means adopted are reasonably designed to attain the objects sought.

In the gas and mineral water cases, the courts sustain the exercise of the police power upon the ground that the prescribed acts impair the equal rights of others possessing identical interests in a common supply. In the cases prohibiting the removal of sand from the seashore and restricting the cutting of trees on privately owned land, the authorization for the use of this extreme power is placed on the broad basis of the public necessity of adequate transportation and the protection of the water supply of the State. In modern society facile means of transportation of men and commodities are absolutely indispensable to human existence. Like

wise if the flow of rivers ceases, and lakes and ponds supplying such streams violently fluctuate from flooded banks to shallow basins the power propelling factories and mills, and the waters for public and personal consumption may become so irregular and uncertain in their flow that industry would wane, unemployment would increase, health would be impaired, fires would destroy accumulated wealth, and the resources of the State would disappear even as they have been destroyed by war. In like manner the vast forests of the State have so disappeared from the activities of man that the materials much used in constructing the homes of men are obtainable only in more and more remote and inaccessible places and have so risen in cost that due in part to such conditions, thousands of people are without homes suitable and proper for their physical, mental and moral growth and welfare.

If, therefore, it can be shown to the satisfaction of the Legislature and the courts that the cutting of immature trees, coniferous or hard, or both, on private lands, has so contributed, or is likely so to contribute, to such disastrous consequences as to actually threaten the sources of the water supply, indispensable to the life of the people, or even the present or future protection of timber necessary for the industries by which the people in large parts of the State live and for the construction of habitations in which they may dwell, then I am inclined to think that to meet such a crisis the Legislature may properly, within its constitutional power, limit the right of an individual to use his own without regard to effect upon his fellows, and to compel him to consider the higher and greater right of the safety of the whole people in his use and application of that which only by the grace of the State, that is, the people, he is permitted to possess.

“As was said by Chief Justice Shaw, ‘It is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.’ *Commonwealth v. Alger*, 7 *Cush.* 53, 84, 85.”

St. Louis & San Francisco R'y. v. Mathews, 165 U. S. 1, 23.

If to protect an individual or a number of individuals in their common rights, if to insure free passage from place to place of

people and commodities for the benefit of the public welfare and the progress of society, the law can say that men shall use, or refrain from using, in a specified manner, their land and its products, why cannot the same power of the State direct and control individual effort so as to prevent the destruction, or diminution of natural resources, as vital to the general welfare and as essential to commerce as harbors for ships and roads for vehicles? Surely the full, free development of the subject-matter of commerce, is as necessary, as vital, as generally beneficial, as the means by which the products of man's industrial efforts are distributed. Without production there can be no transportation; and without consumers there is no need of either.

In drafting an act to effectuate such purpose, the rules and principles which I have attempted generally to outline should be observed. A substantial deviation from them would jeopardize the law. A strict adherence to them, especially in showing the emergency to exist, may impel the legislative branch of government to enact, and, constrain the judicial branch to sustain, a tree-conserving law.

I have refrained from submitting the form of the proposed act. I do that on this ground. I do not consider it, in any way, the function of this office to formulate the policy which will govern another department, in the absence of a statute specifically placing such duty upon the Attorney-General. Your inquiry goes to the legal question of power, not to the present necessity of such legislation, which is a question of policy for the Legislature. "The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of policy." (*People ex rel. Durham v. La Fetra, supra.*) Nor should you overlook the fact that this opinion, given in answer to your very general inquiry, is, of necessity, academic in character and should not be construed as approving or disapproving any specific act. I can pass on such proposed law only when its form and substance are submitted to me.

Dated June 16, 1921.

CHARLES D. NEWTON,
Attorney-General.

By WM. T. MOORE,
Deputy.

TO HON. ELLIS J. STALEY, *Conservation Commissioner.*

SECTION 291 OF THE HIGHWAY LAW — CHAUFFEURS AND OPERATORS' FEES INCLUDED IN THE TERM "REGISTRATION FEES."

The term "registration fees" as used in Subdivision 2, Section 291 of Article 11 of the Highway Law, in relation to motor vehicles includes the fees belonging to the state collected for the issuance of chauffeurs and operators' licenses, and they should be deposited by the Tax Commission to the credit of the Comptroller on account of the Motor Vehicle Law.

INQUIRY

Is the Tax Commission required to deposit the fees collected by it for the issuance of chauffeur's and operator's licenses to the credit of the Comptroller as provided in subdivision 2 of section 291, of the Motor Vehicle Law?

OPINION

Chapter 580, Laws 1921, amends section 291 of article 11 of the Highway Law, known as the Motor Vehicle Law. The heading of the section reads as follows: "*Disposition of registration fees; fines and penalties.*"

Subdivision 2, which is material to this inquiry, provides in part as follows:

"The tax commission shall deposit all registration fees collected by him (it) under this article in a responsible bank, banking house or trust company in the city of Albany, which shall pay the highest rate of interest to the state for such deposit, to the credit of the comptroller on account of the motor vehicle law. * * *"

The determination of the question involves the construction to be placed upon the expression "*all registration fees*" as used in section 291, subdivision 2 of the Highway Law.

The gist of the inquiry is, as to whether the Legislature intended to include in the phrase "all registration fees," those fees collected for the issuance of chauffeurs and operators, which are now denominated throughout the various provisions of the article relating to motor vehicles as "license fees."

Recourse to the various provisions of the statute in its present form sheds but little light upon the legislative intent. At first blush, from a casual reading of the statute, the impression is likely to be gained that the phrase was used in a restrictive sense, and referred merely to those fees collected for registering motor vehicles. However, a close scrutiny of the history of the legislation affecting motor vehicles leads to the conclusion that the

phrase "all registration fees" was intended to include the fees collected for the issuance of chauffeur's and operator's licenses so-called.

The first act passed by the Legislature in relation to the regulation of motor vehicles was chapter 531 of the Laws of 1901 and was an amendment to section 166 of the Highway Law. By that act automobiles were required to be registered for which a fee of one dollar was charged. By chapter 625 of the Laws of 1903, section 166 was again amended, requiring persons operating motor vehicles as a mechanic, employee or for hire to *register* and pay a fee of one dollar.

By chapter 538, Laws of 1904, the Motor Vehicle Law was enacted. Section 2 required automobiles to be registered, and the fee was increased to two dollars. Section 5 required chauffeurs to *register* and pay a fee of two dollars, which was denominated a *registration* fee.

By chapter 30, Laws of 1909 (Consolidated Laws) the Motor Vehicle Law was incorporated in the Highway Law as chapter 11. Section 282 required the registration of motor vehicles and the payment of a fee of two dollars, which was called a filing fee. Section 302 required chauffeurs to register and pay a *registration* fee of two dollars.

Chapter 374 of the Laws of 1910, repealed chapter 30 of the Consolidated and enacted a new article known as the Motor Vehicle Law. Section 282 required registration of motor vehicles and provided for graduated fees. Subdivision 6 of that section provided that motor vehicles that had been licensed for four years as pleasure cars were required to pay only one-half the registration fees.

Section 289 of that act, provided for the licensing of chauffeurs, and increased the fee to five dollars. Subdivision 4 of that section provided that non-resident chauffeurs, who had *registered* under laws of a foreign country or state having substantially equivalent provisions as this section, should be exempt from license.

Section 291 of chapter 374 of the Laws of 1910 made provision for the first time for the disposition of fees. It read as follows:

"The registration fees shall be paid by the Secretary of State to the State Treasurer."

No mention was made of license fees so-called.

The provisions of the sections of chapter 734 of the Laws of 1910, above referred to, remained substantially the same until the passage of chapter 577 of the Laws of 1916. That chapter amended only section 291. In that chapter the Legislature for the first time made provision for the division of fees between the state and the counties thereof. Section 291 as amended, provided that the Secretary of State should deposit *all* registration fees collected by him under this article to his credit on account of the Motor Vehicle Law.

Pursuant to the provisions of section 291 as thus amended the Secretary of State deposited all the fees received, both for registering motor vehicles and for licensing chauffeurs, to his credit on account of the motor vehicle law, which amount was divided between the State and the counties as provided in the statute. That practice was continued until July 1, 1921, when the act transferring the administration of the Motor Vehicle Law to the Tax Commission took effect.

This long continued practice by the officer charged with the administration of the law, so long acquiesced in by the Legislature, while not conclusive cannot be ignored. I should exercise extreme caution before rendering an opinion which may result in mischievous consequences.

In the various provisions of the statute, as I have pointed out, the Legislature has used the terms "registration" and "license" without particular significance and as interchangeable terms.

The Motor Vehicle Law deals comprehensively and minutely with a particular subject, and unless the Legislature intended the phrase "all registration fees" to include fees received for licensing chauffeurs and operators, as well as fees collected for registering motor vehicles, the Legislature has failed to make any specific provision in the act for the disposition of so-called "license fees," which amount to hundreds of thousands of dollars annually. I cannot subscribe to any such oversight on the part of the Legislature.

Although certain provisions of the present act seem to differentiate between the terms "registration certificate" and "license," it seems clear to me, in view of the history of the legislation affecting motor vehicles and the manner in which the term "registration" has been applied to both vehicles and chauffeurs and operators, and furthermore, in view of the long-established practice as to the disposition of these fees, that the Legislature, when it used the expression "all registration fees," intended to include all fees

received for licensing chauffeurs and operators as well as the fees collected for registering motor vehicles.

Therefore, all fees belonging to the State, collected by the Tax Commission for the registration of motor vehicles and for the issuance of chauffeur and operator licenses should be deposited to the credit of the Comptroller, as provided in section 291 of the Highway Law.

Dated July 15th, 1921.

CHARLES D. NEWTON,
Attorney-General.

To: STATE TAX COMMISSION, *Albany*, N. Y.

1. CONSERVATION COMMISSION — POWERS OF. PERMITS — USE OF STREAMS IN FOREST PRESERVE.

The Conservation Commission has power under subdivision 19 of section 59 of the Conservation Law to grant permits to drive logs through streams and lakes in the forest preserve to persons or corporations entitled to remove the same; but such permits should be granted subject to reasonable restrictions and regulations to be determined by the Conservation Commission, and the grantees of such permit will be liable for any damage done to state or private property, while enjoying the privileges granted.

2. CONSERVATION COMMISSION — POWERS OF. PERMITS — CONSTRUCTION OF CAMPS AND STORE HOUSES.

The Conservation Commission may also grant permits to construct upon the forest preserve such camps for men and teams, and such storehouses as may be necessary in the prosecution of a lumbering operation, provided such camps and storehouses be located on cleared land, and the grantees assume responsibility for any and all damage to the state or private property caused by the construction and use thereof under such permits.

3. CONSERVATION COMMISSION — POWERS OF. PERMITS — REPAIRS AND USE OF OLD ROADS.

The Commission may also grant permits for the use and repair of existing log and tote roads, subject to such regulations and restrictions as it may prescribe.

4. CONSERVATION COMMISSION — POWERS OF. PERMITS — REPAIR AND RECONSTRUCTION OF DAMS.

The Commission may also grant permits for the repair or reconstruction of dams on streams flowing through forest preserve lands, provided such dams are necessary to the use of said streams for the purpose specified in subdivision 19 of section 59 of the Conservation Law; and provided further that no state land shall be so flooded as to cause the destruction of timber standing and growing thereon.

5. CONSERVATION COMMISSION — POWERS OF. PERMITS — CUTTING LIVING TREES FOR USE IN RESTORING DAMS.

The Conservation Commission has no power to authorize the cutting and removal of living trees to be used in the repair or reconstruction of dams on streams in the forest preserve, such cutting and removal being forbidden by section 7 of article VII of the State Constitution as well as by subdivision 1 of section 61 of the Conservation Law.

INQUIRY

The Conservation Commission has asked the opinion of the Attorney-General as to the validity of a permit granted by Hon. George D. Pratt, former Conservation Commissioner, dated January 6th, 1921. The material parts of the permit are more particularly referred to in the following discussion:

OPINION

In a letter dated May 24th, 1921, Hon. Ellis J. Staley, Conservation Commissioner, asked the opinion of the Attorney-General as to the legality of a permit granted by Hon. George D. Pratt, former Conservation Commissioner, to the Union Bag and Paper Corporation, dated January 6th, 1921, a copy of which accompanied said letter. From the information furnished it appears that said corporation is about to remove certain soft wood timber from a tract of five thousand acres of land located in Township (Great Lot) 8, Moose River Tract in Hamilton county; that said timber is to be converted into pulp at the mills of said corporation at Hudson Falls; that the only practicable method of transporting said timber to said mills is by teams or tractor to the Cedar lakes, thence by water, down Cedar river to its junction with the Hudson river, and thence down the Hudson to Hudson Falls. Cedar river flows in a northeasterly direction through Townships 3 and 7 of said Moose River Tract. Cedar lakes are on State land and Cedar river flows through State land to a point near the northeasterly end of the Cedar river flow in Township No. 7.

The permit above referred to grants to said corporation various privileges considered necessary to the carrying on of said lumbering operations. In considering the general question submitted it will be convenient to divide it into more specific ones and to treat them separately. Additional facts pertinent to the particular inquiry will be recited as the discussion proceeds.

First. As to the use of the lakes and river in driving logs over State land in the forest preserve. The Union Bag and Paper Corporation may lawfully use the said lakes and river, in transporting its logs, subject to such regulations and conditions as the Conservation Commission may prescribe; but the corporation will be liable for any damage done to State or private property resulting from such use. (*Conservation Law*, § 59, subd. 19.)

The permit of January 6th, 1921, did not, in terms, authorize the use of the Cedar lakes and river for driving logs; but perhaps no special authority was needed as the statute expressly provides that "persons entitled to cut and remove timber under this article *may use streams or other waters of the State within the forest preserve counties for the purpose of removing such timber.*" (Subd. 19, *supra.*)

Second. As to the construction of storehouses and camps at the points indicated on map submitted with other papers.

Subdivision 2 of section 61 of the Conservation Law provides:

"No buildings shall be erected used or maintained upon the forest preserve except under permits from the commission".

A "permit" is

"A written license or warrant, issued by a person in authority, empowering the grantee to do some act not forbidden by law, but not allowable, without such authority."

Black L. Dic., p. 894. .

It is evident that the storehouses and other structures referred to may lawfully be built and maintained, provided a permit be first obtained from the Commission. That has already been done.

A permit to erect and maintain a building upon State land in the forest preserve does not operate as a grant of any estate in the land. The title and constructive possession are still in the State. A lease grants a right of exclusive possession and beneficial enjoyment during the term specified in the grant. A license gives a naked right of occupancy, but without the right to take anything of value from the land. Without a permit the occupancy would be a trespass; with it until countermanded, the grantee may lawfully do the things authorized thereby; but he has no rights which he may assign to another. I find nothing in the Constitution or laws of the State which invalidates the permit to erect the storehouses and camps mentioned in the permit.

Third. As to the use of tote roads, log roads, and sites for unloading logs on the shore of the Cedar lakes.

I am advised that these are old roads, formerly used in similar lumbering operations; and that, in preparing them for future use, standing timber will not have to be cut. The permit to use these roads is granted upon the express condition that they are not to be cleared to a greater width than as heretofore used. In

connection with the permit to repair and use old roads, there is a paragraph numbered "Seventh," which reads as follows:

"Use of dead and down timber. The corporation has also asked permission to use dead and down materials on state land adjoining the roads for placing the roads in condition for use".

This language, while somewhat equivocal, must be construed as a permit to use such materials, as requested.

While the "dead and down timber" contemplated by the permit is located upon State land, and is confessedly to be taken by a private business corporation and used for its own benefit in carrying on its lumbering operations, permission to use such materials for the purpose specified does not seem to be in conflict with section 7 of Article VII of the Constitution. Assuming that dead and down timber is part of the timber, the sale, removal or destruction of which is prohibited the timber to be used in repairing the old roads under the permit is still the property of the State. It is not to be removed from State land nor is it to be destroyed. It is to be removed from one place to another and there utilized, in improving the old roads. This will benefit the Union Bag and Paper Corporation, and as far as appears, will not injure the forest preserve. By subdivision 8 of section 61 of the Conservation Law, it is provided:

"No person shall remove any material belonging to the state from the state lands without the authorization of the commission".

The implication is that material may be removed, when authorized by the Commission. But, as above stated, the permit does not authorize the removal of material from State land. In the exercise of its general powers, and those implied by subdivision 8 of section 61 of the Conservation Law, the Conservation Commission had power, I think, to authorize the use, under proper restrictions, of dead and down timber in repairing the roads for the contemplated use. It is equally clear that a permit to use cleared land adjacent to the Cedar lakes for the storage of logs at points where they can be conveniently rolled into the water, was proper.

Fourth. As to the repair or reconstruction of the dams referred to in the permit.

It is proposed to repair a dam across Cedar river, known as the "Nichols Dam," located in Township No. 7, and to rebuild

a dam at the foot of Cedar lakes, using 225 hardwood trees to be taken from State land in doing the work. The dam at the foot of Cedar lakes was built by the Union Bag and Paper Company in 1902 and the flooding of adjacent land above the level of the Cedar lakes killed the timber standing thereon. This dam has decayed and no longer holds back the water, and the lakes have settled down to their original level. While the reconstruction of the dam would result in again flooding State land, no living timber would be destroyed or other damage done to State property. On the other hand, I am advised that the raising of the water in the lakes would connect them with Beaver pond, lying to the north of the lower lake, would improve the appearance of the lakes and surrounding country and would enable small craft to pass from one lake into another. But while the reconstruction of the dam might thus incidentally benefit hunters, fishermen and tourists, the principal object in rebuilding the dam is to make it possible for the Union Bag and Paper Corporation to float its logs through the Cedar river to its junction with the Hudson. As already appears, the right to use this stream to float logs is expressly granted by subdivision 19 of section 59 of the Conservation Law; and, as the stream, without the dam, would not float the logs, the reconstruction of the dam seems necessary to the enjoyment of the right conferred by the statute.

As the repair of the lower dam and the reconstruction of the upper one are mainly in the interest of the Union Bag and Paper Corporation, the work, while under the supervision of the Conservation Commission, is to be done without expense to the State. All labor and material are to be furnished by the corporation, except that, in rebuilding the upper dam, permission is asked to use 225 hardwood trees, to be taken from State land, at points as near as may be to the dam.

I do not think this may lawfully be done. Section 61 of the Conservation Law reads, in part, as follows:

“§ 61. *Use of forest preserve restricted.* In order to protect the lands described in this article the following provisions shall apply.

1. *Trees or timber.* No person shall cut, remove or destroy any trees or timber or other property thereon or enter upon such lands with intent so to do.” * * *

I have recently advised that the Legislature had power, in its discretion, to authorize the construction of highways in the for-

est preserve, even though such construction involved the cutting and removal of trees from the projected right of way; and the Legislature of 1921 has exercised that power (ch. 410, Laws 1921). But the reasons which led to that conclusion have no application here. The Legislature has never assumed to authorize the taking of living trees from forest preserve lands, in aid of any private enterprise; and the section above quoted expressly prohibits any such taking. The Conservation Commission, of course, cannot authorize what the statute expressly forbids.

While the permit of January 6th, 1921, does not, in terms authorize the cutting of trees on forest preserve land, it must be so construed. The language is:

"Fifth. Dams. Permission to replace the old dam at what is known as the 'Nichols Dam Site.'"

Among the "conditions and limitations" we find the following:

"1. That the repairs to the dams mentioned be made only under the direct supervision and control of the Conservation Commission. Labor and *all materials not available on the ground to be supplied by the Union Bag and Paper Corporation*" * * *

4. That no live timber or *live trees* are to be cut except under the direct supervision of the Conservation Commission."

The 225 live trees which the corporation asked permission to cut and use in reconstructing the dam were "available on the ground" and consequently were not to be furnished by the corporation; and the fourth condition above quoted plainly implies that live trees might be cut under the supervision of the Conservation Commission. That part of the permit which authorizes the cutting of living trees should be revoked; and the other portions thereof allowed to stand.

In a memorandum submitted with the other papers, there is a suggestion that, in selling the 5,000-acre tract to the State, subject to the right to cut and remove the softwood timber, the selling price (\$30,000) was fixed in view of the privileges granted by the permit, including the right to cut 225 trees on forest preserve land to be used in rebuilding the dam at the foot of the Cedar lakes; and that it would be inequitable, after the conveyance, to revoke any part of the permit. But the corporation

was charged with notice of the statute which expressly prohibited the cutting of trees under such circumstances. It must have known, therefore, that the Conservation Commission had no power to authorize the cutting in violation of the statute.

In my opinion the permit is legal except as above stated.

Dated July 20, 1921..

CHARLES D. NEWTON,
Attorney-General.

To HON. ELLIS J. STALEY, *Conservation Commissioner.*

1. CONSTITUTIONAL LAW — FOREST PRESERVE — CONSTRUCTION OF HIGHWAYS
— POWER OF LEGISLATURE TO AUTHORIZE.

Section 7 of article VII of the State Constitution, which provides that state lands in the forest preserve shall not be leased, sold or exchanged or taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed, does not by implication, deprive the Legislature of power to authorize the state commission of highways to construct highways on rights of way dedicated for that purpose over forest preserve land by chapter 330 of the Laws of 1908, as amended.

2. CONSTITUTIONAL LAW — FOREST PRESERVE — CONSTRUCTION OF HIGHWAYS
— USE OF STONE, SAND AND GRAVEL — POWER OF LEGISLATURE TO AUTHORIZE IN HIGHWAY CONSTRUCTION — SPOIL BANKS.

Nor does said section of the Constitution deprive the Legislature of power to authorize the use of stone, sand and gravel, to be taken from forest preserve land, in the construction of said highways and the use of land for spoil banks, to the end that the cost of construction may thereby be properly reduced.

3. CONSERVATION LAW — POWER OF CONSERVATION COMMISSION — HIGHWAY
CONSTRUCTION.

Where highways are to be constructed on forest preserve lands, on routes defined by statute, and stone, sand or gravel are to be taken from adjacent land, to be used in aid of such construction and spoil banks are to be located on state land, the Conservation Commission, being charged with the care, custody and control of the forest preserve, should, with the advice and aid of the engineers of the Highway Commission, locate spoil banks and determine the points from which the material to be used can be most conveniently taken with a view to doing as little damage as possible to the timber, and avoiding unsightly conditions along the projected highway.

INQUIRY

Is chapter 410 of the Laws of 1921 valid, in view of section 7 of Article VII of the State Constitution?

OPINION

At a conference held in the office of the Conservation Commission on the 6th day of June, 1921, to consider the matter of con-

structing State and county highways on lands belonging to the State in forest preserve counties, pursuant to authority conferred upon the State Commissioner of Highways by chapter 401 of the Laws of 1921, said Commission, represented by Acting Secretary Jeremiah C. Finch, joined with the Conservation Commissioner in asking the opinion of the Attorney-General as to the power of the Legislature to enact said statute, in view of the prohibitions contained in section 7 of Article VII of the State Constitution. The Conservation Commissioner asked for an opinion upon the following specific propositions:

1. Is the provision of chapter 410, of the Laws of 1921, authorizing the State Commission of Highways and its duly authorized agents to occupy a right of way over lands in the forest preserve necessary to construct or improve the State and county highways described therein, a valid and constitutional enactment?
2. Are contractors employed by the Commission to construct such roads "duly authorized agents" of the Commission in connection with occupying such lands for establishing rights of way across same?
3. Is the provision of chapter 410 of the Laws of 1921, authorizing the said Commission of Highways and its duly authorized agents to use sand, gravel and stone from State land necessary in connection with the improvement of said highway, a valid and constitutional enactment?

The act is entitled:

"An Act to authorize the State Commission of Highways to use stone, gravel and sand and to occupy a right of way on certain lands in the forest preserve in order to construct the State and county highway designated, described and set forth in chapter eighteen of the laws of nineteen hundred and twenty-one."

By this act the Legislature has attempted to authorize the State Commissioner of Highways to construct improved roads on routes authorized by the Highway Law across forest preserve lands, and to "use such sand, gravel and stone from State land as may be necessary in connection with such improvement." The constitutionality of this legislation is the paramount question.

By the State Constitution (section 7 of article VII), forest preserve lands "shall not be sold, leased or exchanged or be taken by any corporation, public or private, nor shall the timber thereon

be sold, removed or destroyed." Do these provisions, when construed in the light of legislation existing when they were adopted and of the evils sought to be remedied or prevented, deprive the Legislature of power to dedicate a right of way over forest preserve land and to authorize the taking, under proper restrictions, of rock, sand and gravel from adjacent forest preserve lands to be used in the construction of an improved road upon the right of way so dedicated? It must be admitted that, in the absence of a constitutional inhibition, the power of the Legislature in the premises is absolute. In my opinion chapter 410 of the Laws of 1921 does not violate any of the constitutional provisions above quoted. My reasons for this conclusion will be briefly stated.

The recitals in the preamble to the Act of 1921 might suggest that the Legislature regarded the enactment of this statute as an exercise of the police power; but this view cannot be sustained. In *People ex rel. N. Y. Electric Linen Co. v. Squire*, 107 N. Y. 593, at page 605. Judge Buger quotes with approval Judge Cooley's definition of the police power of the State, as follows:

"An elementary writer has said that 'The police of a state, in a comprehensive sense, embraces its system of internal regulation by which it is sought not only to preserve the public order and to prevent offenses against the State, but also to establish, for the intercourse of citizen with citizen, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights of others.'"

He also quotes from the opinion of Judge Shaw in *Commonwealth v. Alger*, 7 Cush. 84, as follows:

"It was 'a well-settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the rights of the community. All property in this commonwealth * * * is held subject to those general regulations, which are necessary to the common good and general welfare.'"

I do not think the police power, as above defined, and as that term is generally used, is here involved. That power is a fundamental element of sovereignty, and is exerted by the Legislature

for the promotion of the health, safety, morals and general welfare of the people. It is directed to the regulation and control of the individual in the exercise of his personal liberty and in the use and enjoyment of his property, to the end that the personal and property rights of others may be protected.

Now, it is manifest that the State, in its sovereign capacity, cannot direct its police regulations against itself. The power of the sovereign is supreme; and its police regulations operate, and are intended to operate only upon the subject — the individual citizen. But the State has a dual capacity — one as the sovereign, or governmental agency of the people; the other, as a *quasi* corporation, capable of buying, owning and selling property, and entering into contracts on the footing of a business corporation.

While, therefore, the State, as sovereign, cannot be made the object of its own regulatory police system, it should, of course, when it assumes the role of proprietor, scrupulously observe that fundamental rule of conduct which it imposes upon the individual, viz.: "*sic utere tuo ut alium non laedas.*"

The policy of the Act of 1921 is in harmony with this maxim of the common law. The development of a system of highways in the forest preserve will accomplish two purposes. It will safeguard the State's own property against the ravages of forest fires, and thus reduce the menace which an inaccessible wilderness, filled with combustible material, must ever be to adjacent property. It also initiates a policy of internal improvement, which if consummated, will greatly add to the value of the Adirondack Park, as a popular resort. The question to be answered is, therefore, solely one of the power of the Legislature under the Constitution, to authorize highways to be constructed on forest preserve lands.

The reasons assigned by the Legislature for the enactment of chapter 410 of the Laws of 1921, in the recitals contained in section 1 thereof, while not open to judicial inquiry, are, it would seem, ample, to justify the construction of the highways authorized by the act. In the absence of suitable highways, the vast stretches of wilderness embraced in the Adirondack Park would be practically inaccessible to the people of the State for whose benefit and pleasure the park was established. Every highway, properly located and improved, becomes at once a powerful ally to the forest rangers, in their efforts to stay the ravages of a forest fire; and to the game protectors, in hunting down the poachers who are a constant menace to the animal life which it is the fixed

policy of the State to conserve. Not only so; but it should be borne in mind that there are in the forest preserve counties, vast holdings of private property, consisting mostly of valuable timber lands, and game preserves, the protection and safety of which are closely bound up with the State's treatment of its own forest lands.

There are in the Adirondack region many villages and hamlets, practically surrounded by forest lands belonging to the State, which, in time of drought, are at the mercy of forest fires, if allowed to sweep, uncontrolled, over vast ranges of State land well supplied with combustible material. *The State, therefore, should, as above suggested, adopt such measures, in dealing with its own property as shall protect, as far as possible, the property rights of its citizens.*

Every one of these considerations finds brief, but pointed, expression in the preamble to the Act of 1921, as follows:

"In order that the forest preserve of the State shall be made more accessible to all of the people of the State, that it be protected from destruction by forest fire, that better means of communication be provided for such fire protection and for policing such preserve for the protection of wild life and the general safety, the State commission of highways and its duly authorized agents are hereby authorized to occupy a right of way over such State lands in the forest preserve as are necessary to construct or improve the State and county highways described, designated and set forth in sections one hundred and twenty-one and one hundred and twenty-two of the highway law * * * ."

The wisdom and propriety of the act cannot be questioned. Does the Constitution forbid the enactment of legislation so benevolent in its purpose and so beneficent in its prospective results?

To begin with, there is a strong *presumption* that all acts of the Legislature are within the legislative power. It is notorious that, in this State, every Legislature is made up largely of lawyers, many of whom are distinguished members of the legal profession. The last Legislature was no exception; and the bill was signed by Governor Miller, who is a jurist of the first rank. Every bill, involving a possible constitutional question, is carefully examined in that aspect, by eminent counsel, selected by the Governor for that very purpose. No act of the Legislature, therefore, should be held unconstitutional unless it is impossible to recon-

cile its provisions with the fundamental law. The rule was laid down by Judge Peckham, in *People ex rel. Carter v. Rice*, 135 N. Y. 473, at page 484, as follows:

“Before courts will deem it their duty to declare an act of the legislature void as in violation of some provision of the Constitution, a case must be presented in which there can be no rational doubt. The incompatibility of the legislative enactment with the Constitution must be manifest and unequivocal. Judge *Denio*, in *People v. Draper* (115 N. Y. 546), expressed the rule in substantially the above language. There is no doubt of its correctness and I have heard no counsel who have challenged it.”

This brings us to the real point in the discussion. The forest preserve lands “shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.”

It is now proposed to construct State highways upon rights of way heretofore described by statute over forest preserve lands; and to use stone, sand and gravel, to be taken from said lands, as far as necessary, in the construction thereof. The stone, sand and gravel belong to the State; and if these materials, required in large quantities, can be taken from convenient points along the right of way, the cost of the highways to the people will be greatly reduced. The Legislature has expressly authorized the taking of these materials, and the Constitution does not expressly forbid.

But is there an implied prohibition? Certainly not, as to the taking of stone, sand and gravel for use in constructing the highways. But in straightening and widening existing highways, and clearing the right of way over new routes, trees standing in the way of the proposed improvement would have to be removed.

Did the Convention which drafted the Constitution have this trifling destruction of trees in mind when it drafted the clause “nor shall the timber thereon be sold, removed or destroyed”? I think not. On the contrary, I think the power which the Legislature had always exercised of delegating to the forest commission authority “to lay out paths and roads in the manner prescribed by law”, was deliberately left untouched. And if the Legislature in the exercise of its sovereign power, may authorize one agency of the State to lay out and construct paths and roads in the forest preserve, it may authorize another similar agency

to do the same thing. That the clause of the Constitution now under consideration was not intended to deprive the Legislature of its power to authorize the construction of highways in the forest preserve seems to be established by the following consideration:

First. The argument from legislation as it existed in 1894, when the Convention sat which drafted our present Constitution.

By chapter 332 of the Laws of 1893 the Legislature had enacted articles VI and VII of chapter 43 of the General Laws. Article VI dealt with the Forest Preserve and article VII with the Adirondack Park. By subdivision 6 of section 121 of article VII, dealing with the Adirondack Park, the Forest Commission was expressly authorized "to lay out paths and roads in the park." The next subdivision of the same section authorized the Forest Commission to sell certain timber "on any of the State forest lands." Many members of the Legislature of 1893 sat in the Convention of 1894; and we must assume that when section 7 of article VII of the Constitution was drafted and approved by the Convention, every act of the Legislature bearing on the subject was before that body, and received the most careful consideration.

The act of 1893 was the latest expression of the policies of the Legislature with reference to the forest preserve; and we find that the Forest Commission, which had been given "The care, custody, control and superintendence of the Forest Preserve" had been authorized by that act and by prior legislation to exercise the following powers:

1. To *lay out paths and roads* in the manner prescribed by law. Section 8 of chapter 707, Laws of 1892.
2. To *lease* lands in the Adirondack Park.. Section 9 of said act.
3. To *sell certain kinds of timber*. Section 103 of chapter 332, Laws of 1893. The authority of the commission was limited to the sale of standing spruce, tamarack, and poplar timber, the fallen timber and the timber injured by blight or fire on any of the State forest lands.

In the act of 1893 the power to lay out paths and roads was conferred by subdivision 6 of section 121 and the power to sell timber, by subdivision 7 of the same section.

Now, in laying out and improving a road in the forest preserve it would be necessary, of course, to cut and remove all trees

and other obstructions standing or lying within the lines of the projected road. Trees of *all* kinds, little and big, would have to be removed. The commission was not authorized to sell hardwood trees of any size not soft wood twelve inches or less in diameter three feet above the ground; but it was expressly authorized to lay out paths and roads *which would require the destruction of all trees standing within the right of way.*

With these powers vested in the Forest Commission, the Convention of 1894 took up its work. The result was the prohibitions contained in section 7 of article VII, as adopted by the people in November, 1894. Under the statute the Forest Commission has power to lease, sell or exchange any lands in the Forest Preserve. Under the Constitution these same lands "shall not be leased, sold or exchanged." Under the statute of 1893 the soft wood timber down to twelve inches in diameter, and all down timber and timber injured by blight or fire could be sold; but the language of the Constitution, was "nor shall the timber thereon be sold, removed or destroyed." The Forest Commission was no longer to be permitted to traffic, at will, in the lands and timber of the Forest Preserve; nor was it to sit by and permit the timber to be removed or destroyed by strangers. *But the power existing in the Forest Commission, to lay out paths and roads in the forest preserve was not disturbed.* This is a most significant fact and shows conclusively that the framers of the Constitution did not intend to prohibit the trifling and incidental destruction of trees involved in the development of a suitable system of roads in the Forest Preserve. (See *Opinions of Attorney-General*, 1919, page 266.)

Second. A construction which would forbid even the incidental destruction of timber made necessary by the laying out of new highways in the forest preserve and the straightening, widening and the otherwise improving of existing highways, would lead to disastrous consequences; and, under well established rules, such narrow construction should be avoided if possible. In the case above referred to (135 N. Y., 473) Judge Peckham, at page 506, says:

"But in seeking for a correct solution of any legal question, especially the question of the proper construction of a statute or a constitution, the result which may follow from one construction or another is *always a potent factor, and is sometimes, in and of itself, conclusive.*"

The benefits to accrue from the development of a suitable system of highways in the Forest Preserve have already been sufficiently pointed out.

In passing, however, it may be said that if the People, by the adoption of the Constitution of 1894, forbidding, the sale of land in the Forest Preserve and of the timber standing thereon, have deprived the Legislature of all power to take active measures for the preservation of the forest and the development of the Adirondack Park along the lines for which it was set apart, then, it must be admitted the Constitution ought to be amended. The Forest Preserve was created primarily for the preservation of the timber standing and growing on lands belonging to the State in the Adirondack region. This timber has enormous commercial value, in addition to its well known efficiency in preventing floods and promoting the even flow of the streams which supply power to the vast system of manufacturing enterprises located thereon. The State maintains, at large expense, a considerable force of men, charged with the duty of protecting the State forests and guarding them against the ravages of fire. The Constitution commands that these lands already timbered or adapted to the growth of trees "shall be forever kept as wild forest lands."

It is the forest themselves that are to be kept from destruction, as well as the duff or vegetable mold which supplies the moisture and nourishment for their growth. Great stress has hitherto been laid on the prohibitions contained in section 7 of article VII of the Constitution, and not enough upon the active duty of protecting the forest upon the lands of the preserve. It was to save these forests from spoliation and destruction by the elements that the lands which sustain them have been acquired by a large expenditure of the people's money and the people's title thereto rendered inalienable. It was to preserve these forests that their timber had been wholly removed from the field of commerce. The prohibition against the sale, removal or destruction of the timber thereon is a permanent barrier against the ever present cupidity of "timber sharks," as well as the possible venality of State agencies, if allowed to exercise the dangerous power of dealing in lands and timber belonging to the people. The active and paramount duty imposed by the Constitution cannot be performed, if the Constitution is to be so construed that the State Commission of highways cannot lawfully be authorized to lay out and improve highways in the forest preserve, nor the Conservation Com-

mission to lay out paths and roads because the work would involve the removal here and there of a few forest trees.

Third. The legislation which followed the adoption of the Constitution of 1894 rests upon the assumption that section 7 of article VII when properly construed, does not forbid the improvement of existing, or the laying out and construction of new highways in the forest preserve by the Highway Department nor the laying out of paths and roads by the Conservation Commission.

The opinion already referred to (*Attorney-General's Report*, 1919, p. 266) reviews the legislation, enacted after 1894 and conferring power on the Forest Commission and its successors, to lay out paths and roads in the forest preserve. (See pp. 275, 276, *supra*.) That power existed prior to the adoption of our present Constitution, and subsequent Legislatures evidently considered that it had not been taken away.

If we turn to the highway legislation enacted since 1894 the same result is reached.

Chapter 115 of the Laws of 1898 was entitled "An Act to provide for the improvement of the public highways." It applied to all highways throughout the State except that highways within the boundaries of any city or incorporated village could not be improved under its provisions.

Under the act the improvement of a highway was to be initiated by the board of supervisors and required the approval of the State Engineer and Surveyor. The State was to bear fifty per cent.; the county thirty-five per cent. and the town fifteen per cent. of the cost. The State Engineer, in making his plans, could provide for deviations so as to shorten the distance or improve the grade. Where deviations were provided for, the county was required to procure the necessary right of way before operations were commenced.

This act applied to all the counties of the State; and if the State Engineer were to lay out a deviation across State land in the forest preserve, the statute would seem to operate as a dedication of a right of way to the extent indicated upon the State Engineer's maps. Such a dedication by the Legislature for highway purposes, would not operate as a sale of State land in the forest preserve, as the title to the land would remain in the State. If the Legislature had intended to except forest preserve lands from the operation of the statute it would naturally have contained appropriate language to that effect, as cities and incorporated villages were expressly excepted.

It appears, therefore, that the Legislature, only three years after the Constitution was adopted, provided for improved roads, with possible deviations over State land in the forest preserve, *knowing that such deviations would involve the removal of trees from the proposed right of way.*

In July, 1907, the State Engineer and Surveyor applied to the Attorney-General for an opinion as to the procedure to be followed in acquiring right of way for an extensive highway improvement in Hamilton and Herkimer counties. The Attorney-General, under date of July 25, 1907. (*Opinions of that year*, page 327), advised the State Engineer and Surveyor that there was no legislation authorizing the taking of land for highway purposes, under the circumstances suggested. He called attention to the act of 1898, as amended, and showed conclusively that that act contemplated the improvement of existing highways and not the establishment of new ones. It authorized deviations; and provided for acquiring land necessary for that purpose. It also authorized the State Engineer, in his discretion, to order two sections of improved highway to be connected when the connecting links would not exceed one mile in length; and the counties were required to condemn the necessary right of way and to construct the connecting highways. The learned Attorney-General was undoubtedly right in advising that no machinery had been provided by law for the laying out and construction of the projected highways. This answered the question; but the opinion did not stop there. The further argument was put forth that because the counties under the act of 1898 were required to condemn and pay for the fee of the land required for deviations and connecting links between existing improved highways, and because portions of the projected highways were to cross State land in the forest preserve which could not be "taken by any corporation, public or private," the required right of way could not lawfully be acquired and the project must, therefore, fail. He argued further, that the authority given to the Forest, Fish and Game Commission, by the Legislature, to "lay out paths and roads" in the forest preserve, was limited by the prohibition against the sale, removal or destruction of timber, so that a path or road could not lawfully be laid out, if, within its boundaries a single tree, however insignificant or valueless, would have to be cut. With the utmost deference to the opinion of the learned Attorney-General, I cannot concur in this view.

In March, 1908, the Assembly adopted a resolution requesting the opinion of the Attorney-General with reference to the following matters:

"(1) The effect of Section 7, Article 7, of the Constitution upon the construction of new highways through State lands within the Forest Preserve, under the provisions of Chapter 115 of the Laws of 1898 and the acts amendatory thereof and supplemental thereto.

(2) The effect of Section 7 of Article 7 of the constitution upon the improvement of highways already existing, where the same, or a portion thereof, is over or through lands of the State within the Forest Preserve.

(3) As to the effect of Section 7, Article 7, of the Constitution, upon the improvement of highways, and the *payment of money therefor*, in towns and counties using what is known as 'the money system' where such highways, or portions thereof, are over or through lands of the State of New York within the Forest Preserve.

(4) In case the inhibition of Section 7, Article 7, of the Constitution absolutely prohibits any construction or improvements to highways under above law, what method, if any, is provided for the working and improvement of highways over or through State lands within the Forest Preserve?"

Here again the learned Attorney-General took the position that, as the improvement of highways under the act of 1898 might require the removal of timber from the right of way, in case of deviations, or the laying out and construction of connecting sections, as provided for in the statute, no matter "how greatly desirable or convenient the improvement of highways, under chapter 115, Laws of 1898, as amended, may appear to be, it cannot be done through the forest preserve, without an amendment to the Constitution." (See *Attorney-General's Report*, 1908, pp. 114, 147.) In the course of his opinion the learned Attorney-General said further:

"There is no exception expressed in the Constitution permitting the removal of timber for road building. If the Constitution be stretched to permit one road, there will be no limit to the number of roads".

The argument rests upon the assumption that a State Commission, appointed by the Governor, with knowledge that the

lands of the State, constituting the forest preserve, were required to be "forever kept as wild forest lands" would nevertheless deliberately lay out in the forest preserve numerous and needless roads and paths, without any motive other than a desire to destroy the timber.

That this argument did not impress the Legislature appears from the fact that on the 19th day of May, 1908, and about two months after said opinion had been rendered, the Legislature enacted the highway law (chapter 330, Laws of 1908), in and by which it created a State Commission of Highways and expressly authorized said Commission to do the very things which the Attorney-General advised could not be done under the Constitution. By section 120 of said act the Legislature established thirty-seven distinct highway routes which were to be constructed or improved at the sole expense of the State. Some of these routes were to be laid out over forest preserve lands. By section 125, the division engineer, in making plans and specifications for a highway, was authorized, among other things, to provide "for the removal or planting of trees within the boundaries of the highway, when necessary for the preservation thereof." (Subd. 6 of said section.)

The act of 1908 was amended generally by chapter 646 of the Laws of 1911. A new subdivision (6-a) was added to said section 125 to read as follows:

"He (the division engineer) may provide therein (i. e., in his plans and specifications) for the removal of, or the trimming of any trees within the boundaries of the highway necessary for the convenience or safety of the public, or the construction or preservation of the highways."

Here express authority was given by the Legislature to the division engineer to remove trees standing in the way of the construction or improvement of any of the projected highways enumerated in the act of 1908, as amended. Several of these were new highways, and, when constructed, would occupy forest preserve land. Thus, the legislative department of the State government, since 1908, has proceeded on the assumption that the incidental cutting and removal of trees standing within the lines of a projected highway, laid out over forest preserve land, under authority of said act, as amended, would not violate section 7 of article VII of the State Constitution. Three Governors, viz., Black, Hughes and Dix, have approved this legisla-

lation. It will not do to say that the legislative leaders of three Legislatures, the Governors who approved the act of 1898, and subsequent statutes, and the special counsel who advised the governors as to the constitutionality of pending legislation were all blind to the constitutional question now under consideration. Much less can it be assumed that, in any single case, the Constitution was consciously and intentionally overridden.

Acting under authority of the act of 1908, as amended, the State Commission of Highways has already constructed highways over forest preserve lands on routes laid down in the statute, and when necessary, trees have been removed. Instead of assuming that the State Commissioner of Highways deliberately flouted the Constitution, it must be assumed that the Constitution was interpreted and understood as not prohibiting the acts done under the statute.

In *City of New York v. N. Y. City Ry.*, 193 N. Y. 543, at page 549, Judge Vann, writing for the court, declared that a practical construction given to a doubtful statute by the legislative and executive departments and continued for many years should have "controlling weight in its interpretation." He then added: "It is held to have great weight *even in the construction of the Constitution itself.*" (The italics are ours.)

In *People ex rel. Einsfeld v. Murray et al.*, 149 N. Y., 367, Ch. J. Andrews, writing for the court, and in speaking of the effect of a practical construction of a constitutional provision, said:

"This legislative policy which has prevailed for so long a period, sanctioned by numerous statutes, never questioned in the courts and acquiesced in by all departments of the state government, is a practical construction of the constitutional provision now in question, that an appropriation of excise moneys to the use of towns and cities under acts passed by a majority vote, is not an infraction of the Constitution, and this construction ought not now to be disturbed."

Fourth. It should be frankly admitted that there are expressions of opinion, in the printed reports found in the office of the Attorney-General which are at variance with the conclusion reached herein. But it must be borne in mind that the opinions of an Attorney-General rendered to the various departments of the State government do not have the force and effect

of judicial decisions and are not binding on his successors in office. They are, however, of great value to the courts and the public, as they reflect the deliberate judgment of the eminent lawyers who were responsible for their publication.

It would be much more agreeable to be able to adopt without exception the views of former Attorneys-General; but in the present instance, I find myself unable to do so. Some of the earlier opinions rest upon too narrow and technical construction of the constitutional provision, and deprive the Legislature of a power over the forest preserve which is absolutely necessary to its preservation. They do not seem to interpret section 7 in the light of the legislative policy embodied in chapter 332 of the Laws of 1893. This act contemplated the wholesale denudation of forest preserve lands by authorizing the sale, not only of mature soft wood timber, but also of the land itself on which the timber stood. When the land was sold the proceeds were to be reinvested in other lands. Discretion in buying and selling land and in selling timber was vested in the Forest Commission, subject only to the approval of the Commissioners of the Land Office. The natural tendency of such a policy, of course, would be that the land which has not been touched by the axe would be sold and land purchased which had been stripped of all its valuable timber. It was doubtless to prevent *this possible abuse of discretionary power* that section 7 of article VII was inserted in the Constitution of 1894. The Legislature was not to be allowed to authorize the sale of timber standing and growing on forest preserve land, nor was it to tolerate its destruction by passively permitting it to be illegally cut and removed.

It was this wholesale destruction of living trees which the constitutional provision was designed and intended to prevent, and not such incidental cutting as should be found necessary in carrying out any existing or future policy of the State in establishing a system of highways in the forest preserve. The Legislature had, by statutes enacted at various times, authorized the construction of roads and paths in the forest preserve; and the Constitution did not expressly, nor by necessary implication, take away that power. If the constitutional inhibition against the sale, removal or destruction of timber shall be liberally construed, as herein suggested, it still affords ample protection. It forbids the sale of timber by the State, and requires the vigorous prosecution of all persons who, by stealth or under claim of right, cut, remove or destroy any timber standing and growing on

State land; and, at the same time it leaves the representatives of the people free to do what may be necessary for the preservation of the State timber lands from the ravages of forest fires and to make the forest preserve and the Adirondack Park more useful, because more accessible to the people. The courts will not presume that the statesmen who drafted the forest preserve clause of our Constitution intended thereby to bring about any absurd or evil consequences. A brief review of some of the opinions which have been rendered on this subject will show the untoward results to which a narrow and literal construction naturally leads.

In February, 1895, the Secretary of the Forest Commission asked the Attorney-General for an opinion as to the power of the Commission to authorize the sale and removal from forest preserve land of logs illegally cut prior to January 1st, 1895. Here was a lot of saw logs, lying on skids. The logs belonged to the State. The question was whether, under the Constitution just adopted, the Forest Commission had power to sell these logs and turn the proceeds into the State treasury; or, on the contrary, whether it must leave this valuable timber to rot where it lay. If the trees had not been already cut, the Legislature could not have authorized their sale; but the damage to the forest had already been done; and express legislative authority was not needed to justify the Forest Commission in preventing a needless waste of public property by the sale of the logs. The learned Attorney-General, after quoting section 7 of article VII of the Constitution, declared that the *object* of the people in adopting it was that thenceforth the forest preserve should be securely fixed "*beyond the cupidity of man.*" It is difficult to imagine how the sale of logs already cut could have exposed the State forests to any danger, as a result of the "*cupidity of man.*"

It has been suggested that, if saw logs could lawfully be sold, lumbermen, desiring to secure timber on forest preserve land, would be tempted to wrongfully enter upon State land, cut the trees, and then, the damage having been done, proceed to buy the *down timber and remove it*. The answer is that the Conservation Law provides a penalty of \$10 for every tree illegally cut on State land. The suggested danger is purely imaginary and ought not for a moment to stand in the way of a rational and beneficent construction of the Constitution.

Nothing would be gained by an extended review of the opinions written by former Attorney-Generals on the subject of highways in the forest preserve. Most of them dealt, not with the

power of the Legislature under the Constitution, but with the power of the Highway Commission under then existing statutes. Prior to 1908 the Legislature had never dedicated a right of way, or authorized the State Commission of Highways to initiate any highway construction over forest preserve land. Former opinions, therefore, while containing expressions as to the effect and meaning of section 7, article VII of the State Constitution, are not, as a rule, *germane* to the present discussion.

Thus in 1910 the Attorney-General advised the Forest, Fish and Game Commission that it had no power to authorize county officials to take stone for highway construction from a ledge located on forest preserve land. The opinion was sound. By statute the Forest, Fish and Game Commission had been given the care, custody and control of the forest preserve; but the power thus conferred did not, by implication, authorize the Commission *to give away State property*. That was all that was decided. But by the act of 1921 the Legislature expressly authorized the State Commission of Highways to use stone, sand and gravel, for highway purposes. The highways are State highways, and are to be constructed by State officials on State land.

The same Attorney-General in 1909 advised the State Commission of Highways, as follows:

"While it is more than likely that it was not originally intended to prohibit the laying out and working of highways through the forest preserve, still the language will not bear any other interpretation, and I am therefore of the opinion that neither new state or county highways can be cut or worked through any part of the forest preserve until some change has been made in the Constitution." (Attorney-General's Opinions, 1909, p. 663 at at p. 665.)

If it is "more than likely" that the Constitution was not intended to prohibit the construction of highways in the forest preserve, then the Legislature of 1921 was fully justified in the action taken. The spirit and purpose of the Constitution control, and not the letter of the provision sought to be interpreted. But there is no prohibition even in the letter of the Constitution. The prohibition of highways is a mere implication derived from the prohibition of trafficking in the land and timber of the forest preserve. The implication is not sought to be justified by any process of reasoning, and ignores the condition of the statute law existing in 1894 as hereinbefore pointed out.

Fifth. An objection to the views herein expressed has been raised, predicated upon the amendment of section 7 of article VII, proposed by the Legislature of 1916 and 1917, and adopted by the people at the November election in 1918. The amendment, which immediately follows the prohibition against the sale, removal or destruction of timber, reads, as follows:

“Nothing contained in this section shall prevent the state from constructing a state highway from Saranac Lake in Franklin county to Long Lake in Hamilton county and thence to Old Forge in Herkimer county by way of Blue Mountain lake and Raquette lake”.

It will be noticed that the language of the section, as it had stood since its adoption in 1894, was not changed. There was no abatement of the requirement that the forest preserve should be “forever kept as wild forest lands.” The prohibitions contained in the next sentence remained in full force:

“They (the forest preserve lands) shall not be leased, sold or exchanged, or taken (*in invitum*) by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.”

Then followed the amendment:

“But nothing contained in this section shall prevent the state from constructing a state highway,” &c.

Now, this amendment had its origin in the Legislature. It was embodied in a concurrent resolution adopted by the two Legislatures which sat immediately preceding its final adoption. Why did the Legislature of 1916 propose this amendment? Was it regarded as indispensable to the lawful construction of the highway therein described, or as merely expedient, in order to set at rest a question of legislative power? The highway authorized by the amendment was an important undertaking, and involved a large expenditure of public funds. The law required the work to be done under contracts to which the State would be made a party by the action of its officers and agents. If the contracts should turn out to be unauthorized, they would be void. Contractors would naturally hesitate to submit bids and undertake to do the work, if there were any reasonable doubt as to the power of the State Commission of Highways to act in the premises. While no court had ever decided that the Constitution stood in the way, the legislative body was familiar with the official opinions which had theretofore been published. The doctrine had gone

forth that the people, in adopting the Constitution, had decreed that the forest preserve should remain absolutely untouched by the hand of men. Not a tree could be cut down, even if it stood in the way of road construction considered absolutely necessary to the protection from fire of thousands of other trees. It is highly probable, therefore, that the submission of the amendment of 1918 was a precautionary measure, and not necessarily considered indispensable to legislative action.

But even if we assume that the Legislature proposed the amendment, believing that, without it, the highway described therein could not lawfully be constructed, the opinion of the Legislature, while entitled to fair consideration, is not controlling. The question is judicial and its final determination rests with the courts. An act of the Legislature assuming to declare the purpose and meaning of existing legislation would be wholly nugatory, because unauthorized. The same may be said of a concurrent resolution attempting to construe a clause of the State Constitution. The interpretation of constitutions and statutes is a judicial and not a legislative function. If, therefore, the adoption of the amendment of 1918 had been inspired by the belief that, without it, the proposed highway could not be constructed, the matter would still be open to judicial inquiry.

But it is not at all necessary to assume that the Legislature entertained any such view. It is more natural to assume that, as to the contemplated highway, it was deemed expedient to make explicit by amendment what was already implicit in the existing language of the Constitution.

But even if the Legislature, by proposing the amendment and limiting it to the particular highway therein described should be understood as expressing its opinion that without such amendment the highway could not be lawfully constructed, its effect, as an argument, is neutralized by the action taken by the Legislature of 1921. Here the attitude of the Legislature cannot be misunderstood. It must be assumed that the Legislature of 1921 believed, in good faith, that it had power, under the Constitution, as it stood prior to the amendment of 1911, to authorize the construction of highways in the forest preserve. In that view I concur. The act of 1921 reflects a rising sentiment in favor of a more liberal exercise of power in dealing with the forest preserve. If the State Commission of Highways and the Conservation Commission shall accept the act of 1921 as a valid exercise of the legislative power and shall proceed thereunder to develop a high-

way system commensurate with the needs of the public, their action will not, in my opinion, offend against any constitutional provision.

In conclusion, it may be well to add that as the Conservation Commission is charged by statute with the duty of protecting the forest preserve, and as the act of 1921 authorizes the use of sand, gravel and stone in the highway construction, contemplated by the act, the points from which such materials should be taken, the roads leading thereto and the location of spoil banks should all be determined by the Conservation Commission, with the advice and aid of the engineers of the Highway Department, to the end that the materials required may be conveniently obtained and that damage to adjacent land by the destruction of timber and the creation of unsightly conditions along the new highway may be reduced to the minimum.

Dated, July 20, 1921.

CHARLES D. NEWTON,
Attorney-General.

By THOMAS F. FENNELL,
First Deputy.

TO HON. ELLIS J. STALEY, *Conservation Commissioner, and the
State Commissioner of Highways.*

CIVIL SERVICE LAW, SECTION 22-a — RULE XVI — SUSPENDED LIST —
REINSTATEMENTS — TRANSFERS — PROMOTIONS — APPOINTMENTS.

Various questions arising under section 22-a of the Civil Service Law, with respect to "suspended list" of persons whose positions have been abolished, considered.

INQUIRY

1. Does the provision of civil service rule VIII, subdivision 6, allowing appointment for one month regardless of standing on a list, apply to suspended list?

2. Can reinstatements of persons who resigned within a year be made under civil service rule XVI, subdivision 1, without regard to list of suspended employees?

3. Can promotions be accepted from promotion lists when there is a suspended list for the same title and salary grade of position?

4. When the suspended list is reduced to one or two names, (a) is appointing officer obliged to select therefrom, or (b)

should the Civil Service Commission certify the name or names remaining on the suspended list with the addition of necessary number of names from the regular eligible list to make a complete certification of three names?

5. Can persons whose names appear on suspended list be reappointed under civil service rule XVI, subdivision 1, regardless of their standing on the list?

6. Can transfers which meet the conditions of the transfer rule be allowed regardless of suspended lists?

OPINION

After the consolidation of the Civil Service Law of 1899 and the adoption of rules thereunder, the practice under the statute and rules became pretty definitely established, and for a long period there were few changes in the statute or the rules. In 1901 the provisions for graded service were created in a separate act, which was consolidated with the Civil Service Law in the consolidation of 1909. From then until 1917 there were very few changes in statute or rules, and a very definite policy with respect to appointments, promotions, transfers and reinstatements became generally understood, rarely questioned, and never or practically never departed from.

This policy embodied several principles, such as:

(1) Appointments from open competitive lists would not be permitted, where promotion within the department was practicable, but vacancies in higher positions would be filled by promotions leaving lower vacancies to be filled by appointment from original lists (cf. C. S. L. § 16, Rule XIV, 1.)

(2) Transfers could always be made, even though there were lists from which original appointments might be made (Rule XV.) Similarly, persons separated from the service through no fault of their own could be reinstated (within a year) in their old departments or appointed to positions in other departments, to which they had been eligible for transfer, without certification and regardless of the existence of open competitive lists for original appointment (Rule XVI, 1)

(3) Promotions were preferred over transfers (Rule XV, 6), though not over reinstatements. Promotions were also preferred over appointments (in different departments) of persons eligible under Rule XVI, 1, for their eligibility for such appointment was conditioned on eligibility for transfer under Rule XV.

The names of persons covered by Rule XVI, 1, did not, properly speaking, go upon a list. That is, they were not placed in any definite order upon a list, and although the names were necessarily compiled so that eligibility could easily be checked up, the Civil Service Commission did not certify groups of names from the compilation.

In 1914, 1915 and 1916, subdivision 2 of Rule XVI was changed a number of times, the Commission experimenting with various theories for a definite regulation of rights of persons whose positions were abolished. The theory was settled by the Commission in 1916 when that subdivision took its present form, providing for a "suspended list" of persons whose positions were abolished, from which certification should be made (a) to fill vacancies in any department — Civil War Veterans only, and (b) to fill vacancies in the department from which employees had been dropped — certification in order of original appointment to the abolished positions.

Persons whose positions were abolished went upon the "suspended list," and they became *entitled to reinstatement* if their *same* positions were re-established within a year and *entitled to certification* (to a narrowly limited class of position) in preference to those upon open competitive lists. Persons who were separated from the service by resignation, suspension, leave of absence, removal without fault, etc., did not go upon the suspended list, but upon the compilation mentioned above. And they were not *entitled to certification*, but were *eligible for reinstatement*, and *eligible for appointment* in other departments (subject to the preference granted to promotions.)

The difference between the right to certification in preference to open lists, and eligibility for reinstatement or reappointment, should be borne in mind. For neither had preference over the other. The head of a department who had a vacancy to fill (which could not properly be filled by promotion) might fill it in one of three ways:

- (1) By appointment from the "suspended list" for his own department, or in the absence of such a list, from an open list.
- (2) By transfer.
- (3) By appointment under Rule XVI, 1. If the position were a re-establishment of position theretofore abolished, persons on the "suspended list" were preferred for re-appointment, but otherwise there was no preference. The head of the department

might take his choice of transfer, appointment under Rule XVI, 1, or appointment from a certification (under Rule XVI, 2, first, then from an open list.)

In 1919 and 1920 the legislature added sections to the Civil Service Law. The result of these amendments is the subject of the present inquiry.

By chapter 251 of the Laws of 1919, section 31 was added to the law. This provided that where an employee was *separated from the service* through the abolition of a department, office or institution, or a section, bureau or division thereof, his name should be placed upon a "preferred list." This covered part of the ground covered by Rule XVI, 2, but not all, for it did not apply to individual positions abolished in a department or bureau which was continued. It created "a preferred list for the office, or position, in which he has been employed, or for *any corresponding position in the same group and grade.*" Rule XVI, 2, provided for certification (except Civil War Veterans) only to the department from which persons had been dropped. Whether section 31 intended certification to be made to other departments is doubtful. If the department were abolished, certification could not well be made to *it*. But on the other hand, section 31 provides only for certification for *reinstatement* — and appointment in another department had never been regarded as a *reinstatement* — it was either an appointment or a transfer. This would seem to indicate that only certification to the same department was contemplated. And from such a viewpoint the section seems superfluous, for it did not modify Rule XVI, 2, but merely paralleled it *in part*. To my mind the only purpose it could serve was to make it impossible for the Civil Service Commission, by amending its rules, to modify Rule XVI, 2, so far as that applied to positions abolished as a part of the discontinuance of a department or bureau, and to modify section 22, as hereinafter shown.

It should be noted that the Civil Service Commission always regarded a person as *separated from the service*, if his position were abolished, as much as when he resigned, was removed, or extended his leave of absence without pay for more than a prescribed time. It also regarded a *suspended* person as separated from the service. To be sure, section 22 always provided that a veteran, whose position was abolished, should not be separated from the service, but should be transferred to another position if one were vacant which he was fitted to fill. But if he could not

be transferred, for lack of a vacancy, he necessarily became separated from the service—and section 22 never provided a preferred list for him. In the five counties in New York City, as in the government of the city itself (under the charter) persons holding competitive positions, whose positions were abolished, went upon a “list of suspended employees” for certification in preference to any other list—but nothing is said to the effect that such persons should not be *separated from the service*. They were regarded as separated, but eligible for re-employment.

The “list of suspended employees” was preferred in certification over open competitive lists, but transfers, and appointments under Rule XVI, 1, could always be made even where such a list existed.

Rule XVI, 2, could not, of course, supersede the mandate of section 22, so, after its adoption there were three kinds of lists from which appointments could be made, with preference as follows:

- (1) Under section 22.
- (2) The list under Rule XVI, 2.
- (3) Open competitive lists.

And transfers or appointments could always be made, in spite of the existence of any or all of such lists.

Further, *promotions could always be made*, and were in fact preferred, in spite of the existence of such lists.

The passage of section 31, in 1919, added one more list from which certifications should be made in preference to all other lists. And still promotions were preferred, and transfers, or appointments under Rule XVI, 2, were possible, in spite of the existence of the other lists (now four).

That is, although there were now four classes of lists from which *certification* could be made for *appointment*, the head of a department (except in reinstatement in the same position, or one identical with it) could fill a vacancy by *promotion* if possible, otherwise by *transfer* or *appointment under Rule XVI, 1*, without calling for certification from any one of them.

Of course, Civil War Veterans always had their constitutional preference, which was not superseded by any statutory amendment or change in the rules.

In 1920 the Legislature added a second “Section 22-a” to the Civil Service Law (one had been added in 1918) by chapter 836 of the laws of that year. This is the section with the interpretation of which we are immediately concerned. It seems to be in complete conflict with section 31, and Rule XVI, 2, except where

it merely reiterates their provisions, and it provides for a new list which takes the place of the lists under them.

Section 22-a begins by providing that when any position in the competitive class or qualified grades is abolished, the incumbent shall be deemed *suspended* without pay. This brings such persons into the provisions of subdivision 1 of Rule XVI, which covers persons who are *suspended*. It next provides that the order of suspension shall be in inverse order of original appointment—this provision was the subject of a lengthy opinion from this department in July, 1920 (*Rep. Atty.-Gen.*, 1920, p. 137), and needs no comment here. It goes on to provide that the person suspended shall be *entitled to reinstatement*, in order of original appointment in that or a corresponding or similar position if there is need for his services within two years. That means the same position in the same department, or one just like it in the same department, or one created under a different title but for the same purpose in the same department. It cannot refer to a *different* position in the same department or to a similar position in a different department, for in such a case the vacancy would be filled, not by *reinstatement*, but by *transfer* or *appointment*. Also, if a different position in the same department or a position in another department were intended, the rest of the section would be superfluous.

The section goes on to provide for a "list of suspended employees" from which *certification* must be made before certification from any other list. There is a preference for *reinstatement* and a preference for *certification*. But there is no preference for *appointment* to a different position, no preference over Rule XVI, 1, no preference over transfer. If opportunity occurs for *reinstatement* (*i. e.*, to the same or corresponding position in the same department) *one* upon the the list is *entitled* to be reinstated. The head of the department has no choice. He must take the man at the top of the list. But if a vacancy occurs to which *reinstatement* cannot be made, the head of the department can still fill it by transfer, by appointment under Rule XVI, 1, or by taking a name from a *certified* list. He is not restricted, He can take anybody eligible for transfer (with the consent of the head of the department from which transfer is made, and of the Civil Service Commission). He can take anybody eligible under Rule XVI, 1. Or he can ask for a certification, getting three names. If he asks for a certification he will get names from the list under section 22-a if there be such a list. If there

be no such list he will get names from the list under the latter part of section 22, if any. Otherwise he will get names from an open competitive list. The lists under section 31 and Rule XVI, 2, disappear, for all those names are of necessity upon the list under section 22-a.

But the question of promotion comes in. Could the head of the department ask for a promotion list? Or does the provision "before making certification from any other list" in section 22-a give a preference to that list over promotion lists? I think not, for the following reasons:

The Civil Service Law, as it stands, mentions lists, and certification from lists, but it does not mention promotion lists nor certification for promotion. When section 22-a was added, creating a list which should have preference over other lists, it naturally means the other lists mentioned in the statute itself. It means the open competitive lists mentioned in sections 14 and 15, the "list of suspended employees" mentioned in section 22, the "preferred list" mentioned in section 31. But it is a primary rule of statutory construction that where different parts of the same statute, or different statutes, seems to be in conflict and it is not *clear* that the later enactment was intended to repeal the former, they will be interpreted so as to give effect to both, as far as possible. Repeals by implication are only considered to exist where the intent is unmistakable. And we have section 16 of the law providing: "Vacancies in positions in the competitive class shall be filled, so far as practicable, *by promotion* * * *".

With promotion always preferred over transfer or appointment under Rule XVI, 1, it would be absurd to say that the head of a department might fill a vacancy by one of those methods, without calling for certification under section 22-a, but could not make a promotion.

Also, under section 16 an increase of salary beyond a grade, without change of duties, is a promotion, to be made, under Rule XIV after examination where more than three are eligible. This kind of promotion does not fill any vacancy in position, but only a vacancy in part of a one-salary appropriation.

If we were to rule otherwise where would it lead us? The stenographers in the Attorney-General's office are specialized in legal work. A vacancy in an \$1,800 position occurs. There are stenographers at \$1,500, eligible for promotion, and others down to \$900. A stenographer who had drawn \$1,800 in the Highway Department could not be transferred to the position.

The statute prohibits it, and she would not be as well fitted for the position as one of our own \$900 girls, nor any better than a \$1,200 girl on an open list. If I had to appoint her in preference to making a promotion, I would be wasting the State's money if I gave her more than \$900 or \$1,200. And the \$1,500 girls would lose the rare opportunity to get ahead—a bad thing for their morale, which rests largely on ambition. It would be a direct defiance to the promotion principle.

Or suppose I have one clerk in the \$1,800 grade and because of his value, and fear that he will find a better position elsewhere, I succeed in getting an appropriation of \$2,100 for him from the Legislature. Could it be that the Legislature, which appropriated the money for him, intended that he could not get it so long as there was a \$2,100 clerk on the suspended list, dropped from the Health Department? Or that I was expected to drop him and appoint the Health Department man in his place?

The Legislature will not be presumed to have intended an absurdity.

I conclude that the preference over other lists in section 22-a is a preference over the other *statutory* lists, the "open competitive," "suspended employee," and "preferred" lists mentioned above, but not over promotion lists, nor over promotions made without certification, where permitted by the rules.

The purpose of section 22-a was to enlarge, not to restrict, the rights of persons who were separated from the service by the abolition of their positions. Therefore I cannot believe that it was intended to put them in a worse position than those separated from the service, equally without fault, but by their own voluntary acts. I cannot believe that it was intended to exclude them from the rights accorded to persons who resigned. The section specifically says they shall be deemed *suspended*. It says that first. And they should have all the rights accorded by Rule XVI, 1, to suspend persons, equally with those who resign or procure leave of absence. As pointed out above, the preference in order of original appointment runs only to *reinstatement* and to *certification in groups*. Where there is no reinstatement and no certification, I consider these persons *suspended*, and eligible equally with other suspended persons, to appointment under Rule XVI, 1.

When the head of a department calls for a certification of names, from preferred or open competitive lists, which he only

does when he need not make a promotion and does not wish to make a transfer or an appointment under Rule XVI, 1, he is entitled to a choice. With the exception of the short time when the statute contained the provision held unconstitutional in *People ex rel. Balcom v. Mosher*, 163 N. Y. 32, appointing officers have always been given a choice of three names, with two exceptions. One is in case there is a Civil War Veteran on the list, and the other is in case of *reinstatement* under section 22-a (or formerly under Rule XVI, 2). In providing for certification from open lists, it has always been the rule that if there were less than three names on a list, the appointing officer was entitled to a new list. There is nothing in section 22-a to indicate an intent to depart from this rule. "Certification" is used therein in the usual sense. And I consider the appointing officer still entitled to three names. If the suspended list contains but two names, one should be added from the next best list (that under section 22 or an open list) and if there be no next best list, then one should be prepared, just as if it had been a competitive list which contained but two names.

I think the suspended list should be regarded as in effect the top part of a list containing, (1) the list under section 22-a, (2) the list under section 22 and (3) the open competitive list. This for the purpose of certification, and equally for the purpose of temporary appointments under Rule VIII, 6. Such temporary appointments should be possible regardless of position on the total list.

Section 22-a contains a saving clause for veterans covered by section 22. They get the benefits of section 22-a, but are not prejudiced by it. So, if a veteran's position be abolished, he is still *entitled* to transfer, if he can find a vacant position at the same salary, which he is fitted to fill. And the appointing officer has no choice in that case. He cannot fill the vacancy by transfer, appointment under Rule XVI, 1, or by taking a name from a certified list. He must take the veteran. If there be several eligible veterans, there is no preference among them, and the appointing officer may take his choice.

By way of recapitulation I will answer the questions submitted, as follows:

1. Does the provision of civil service Rule VIII, subdivision 6, allowing appointment for one month regardless of standing on a list, apply to suspended lists?

Answer: The suspended list should be regarded as the first

part of a grand list, from which any name may be taken for temporary appointment.

2. Can reinstatements of persons who resigned within a year be made under civil service Rule XVI, subdivision 1, without regard to list of suspended employees?

Answer: Yes.

3. Can promotions be accepted from promotion lists when there is a suspended list for the same title and salary grade of position?

Answer: Yes.

4. When the suspended list is reduced to one or two names (a) is appointing officer obliged to select therefrom, or (b) should the Civil Service Commission certify the name or names remaining on the suspended list with the addition of necessary number of names from the regular eligible list to make a complete certification of three names?

Answer: (a) No, (b) Yes.

5. Can persons whose names appear on suspended list be reappointed under civil service rule XVI, subdivision 1, regardless of their standing on the list?

Answer: Yes.

6. Can transfers which meet the conditions of the transfer rule be allowed regardless of suspended lists?

Answer: Yes.

Dated July 21, 1921.

CHARLES D. NEWTON,
Attorney-General

By THOMAS F. FENNELL,
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TO THE STATE CIVIL SERVICE COMMISSION.

CIVIL SERVICE LAW, SECTION 21-b—LEGISLATURE 1921, CHAPTER 702—
PREFERENCES TO VETERANS—CONSTITUTION V, 9; X, 2.

(1) Paragraph "C" of section 21-b of the Civil Service Law, giving preferences in appointment in the civil service to "disabled veterans," is unconstitutional, being in conflict with section 9 of article V of the Constitution.

(2) The first part of paragraph "d" of section 21-b of the Civil Service Law, construed in the light of Constitution, article X, section 2, only grants to "veterans" preference in certification over those having the same percentage rating upon competitive lists, and not preference in appointment among those certified.

(3) The last part of paragraph "d" of section 21-b of the Civil Service Law entitled "veterans" to preference in certification from lists of the labor class in cities, but not in appointment among those certified.

(4) Credit for military service, in competitive examinations, should depend upon the value of the experience as a factor in determining merit and fitness for the position sought, its weight to be determined for each class of positions by the Civil Service Commission, but not to exceed twenty per cent of total weights.

INQUIRY

To what extent is section 21-b of the Civil Service Law, added by chapter 702 of the Laws of 1921, in conflict with the Constitution, and to what extent is it operative?

OPINION

On May 18, 1921, I rendered an opinion, at the request of the Civil Service Commission, upon the construction of section 21-b of the Civil Service Law as added by chapter 702 of the Laws of 1921. I closed that opinion with the words: "My opinion has not been requested with respect to the constitutionality of any part of this statute, and I have considered no constitutional questions in arriving at the conclusions above stated."

On July 13th, 1921, the Court of Appeals decided the case entitled "*Matter of Barthelmess et al. v. Cukor et al.*" The opinion in that case, *per* Judge Cardoza, contains an elaborate exposition of the purpose and effect of section 9 of Article V of the Constitution of New York, which provides:

"Civil service appointments and promotions.—Section 9. Appointments and promotions in the civil service of the State and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive; provided, however, that honorably discharged soldiers and sailors from the army and navy of the United States in the late civil war, who are citizens and residents of this State, shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment of promotion may be made. Laws shall be made to provide for the enforcement of this section."

The court held that the statute then under consideration (Military Law, sections 245, paragraph 7, as amended by L. 1920, c. 282), violated the constitutional provision in attempting to grant

a preference in promotions in the civil service to a class, other than veterans of the Civil War, which preference was not based upon merit and fitness determined by competitive examination, in cases in which competitive examination was practicable.

The opinion settles, beyond any possibility of argument, that service in the armed forces of the United States, other than service in the Civil War, cannot, of *itself*, be made the ground for preference in appointment or promotion in the civil service of the State, its subdivisions or municipalities, where it is practicable to test merit and fitness by examination.

The opinion in the *Barthelemess* case absolutely controls us in considering the effect of section 21-b of the Civil Service Law as added by L. 1921, c. 702. This statute is divided into four paragraphs:

Paragraph "a" defines the word "veteran" as including those residents of New York who served in specified manner in the forces of the United States in time of war, or who served in specified manner with a nation associated with the United States in the World War.

Paragraph, "b" defines a "*disabled veteran*" as a veteran found (by the department of health) to have been disabled in one of divers enumerated respects.

(1) Paragraph "c" provides:

"(c) Every disabled veteran shall be entitled to preference in original appointment without regard to his standing on any list from which such appointment may be made, to all competitive positions in the civil service of the State and the civil divisions thereof, provided his qualifications and fitness shall have been ascertained as provided in this chapter and the rules and regulations made in pursuance thereof; and a person so preferred shall not be disqualified from holding any position in such service on account of his age or disability, provided such age or disability does not render him incompetent to perform the duties of the position."

This provision might well have been the subject of the following language in the opinion of the Court of Appeals referred to:

"This statute is not an estimate of capacity. It is the expression of a preference. The Legislature has not said that the test of competitive examination is impracticable, no matter what the position, whenever soldiers or sailors are among

the candidates for promotion. It has said, in effect, that even though the test of competitive examination be practicable, soldiers and sailors shall be eligible in advance of others. The statute was so construed at the Appellate Division, and its entire scheme and framework exclude another meaning. Mere entrance into army or navy, and that whether voluntary or involuntary, is made sufficient for preferment. Neither the kind nor the quality or the duration of the service is important. There is not even the requirement of an honorable discharge. Service for a month or a day as cook or as hostler counts as much as service throughout the war, and the winning of a cross of honor. The preference is not confined to callings or positions where efficiency might be thought to be promoted by the discipline of camp or ship. The clerk or the bookkeeper is subjected to the same tests as the policeman or fireman."

The court held that the statute violated the constitutional provision. And it is obvious that the act now under consideration is equally invalid.

The mere fact that the preferences in paragraph "c" are limited to "disabled" veterans, does not cure it. Mere physical disability, even though incurred in the line of military duty, does not increase a man's merit or fitness for civil office. If anything, its tendency would be the opposite. And the preference is not even limited to those suffering from "honorable scars." It applies equally to those suffering from disgraceful diseases which could not have been contracted in the line of duty.

The court said:

"The discipline of army or navy, to justify this exaltation of its significance, must bear something more than a remote or fanciful relation to the duties of office or employment."

The same is equally true of a disability incurred during military service. The loss of a leg does not necessarily make a man a worse clerk or stenographer than the next one, but it certainly does not, of itself, make him a better one.

As the court said of the other statute:

"The condemnation of the act is written in the constitution in words too plain to be misread."

I conclude that paragraph "c" of the statute is unconstitutional in its entirety, for the last part of it, prohibiting disqualification, only applies to persons "*so preferred*."

(2) Paragraph "d" of the section under consideration provides:

"Every veteran shall be entitled to preference in original appointment to all competitive positions in the civil service of the state and the civil divisions thereof over all other persons eligible for such appointment and standing on the list therefor with a rating equal to that of such veteran."

No attempt is made here to prefer "veterans" in appointment over those standing higher upon the list, so it cannot be said that the "merit and fitness" rule of the constitution is violated. In my opinion of May 18th, I held that preference over those standing with equal rating on the list carried with it a preference over those with lower rating. And the effect of this would be that if a veteran's name were first among three, certified by the civil service commission as eligible for appointment, he must be chosen by the appointing officer. As I have noted above, in preparing that opinion I considered merely the interpretation of the statute, as it stood, without reference to the Constitution. But now I am asked for advice upon the constitutionality of the act, and must go farther. Another section of the Constitution intervenes. The Court of Appeals mentions it in the *Barthelmess* case, saying:

"Nothing in *People ex rel Balcom v. Mosher*, 163 N. Y., 32, is authority for these bizarre conclusions. We construed the civil service section of the constitution in the light of another section (Art. 10, sec. 2) which says that local officers shall be chosen by the local authorities. We said that this implied some privilege of selection on the part of the public officer who was to exercise the appointing power. The legislature might require him to make a choice among the three highest on the list, but could not exclude judgment altogether by restricting him to the one that was highest of the three."

Paragraph "d," interpreted according to my former opinion, would have the effect of restricting the power of appointment in violation of Article X, Section 2, of the constitution. That section applies only to appointments in counties, towns, villages, and cities. The rule does not necessarily apply to the state service. But the paragraph of the statute was obviously intended to apply equally to the state and to its civil divisions. I cannot believe that the legislature intended one rule for the state govern-

ment, and another for the counties and villages — the law controlling which is administered by the same State Civil Service Commission — or for the cities, even though they have separate municipal commissions. After the Court of Appeals, in the Balcom case, held a section of the Civil Service Law void as against cities, the legislature proceeded to repeal it in its entirety. It was not left upon the books to tie the hands of state officers in a manner in which those of local officers could not be tied. Here, too, I believe the legislature intended the same rule for all, and the paragraph should be held to mean the same for the state as for the localities.

There is a possible construction of paragraph "d," which is not in conflict with the constitution. It is our duty, under the well established rules of statutory interpretation, to adopt this construction. The statute grants to the veteran a preference "over all other persons eligible for such appointment and standing on the list thereof with a rating equal to that of such veteran." It occasionally happens that two candidates receive exactly equal civil service ratings. The Civil Service Rules provide (XI, 2):

"When two or more eligibles on a register have the same average percentage, preference in certification shall be determined by the order in which their applications were filed * * *."

This is a rule of convenience, some rule being necessary in the circumstances. Subdivision "d" of section 21b, if interpreted as merely a substitute for this rule, in cases where veterans are involved, is reasonable and violative of no constitutional provision. Therefore, under the rules of construction, this interpretation should be adopted.

Although the statute speaks of *appointment* rather than *certification*, that was also true of the statute denounced in the *Barthelmess* case, but the court said:

"It is not addressed exclusively to the power that appoints. It is addressed to the power that certifies the names of those eligible for appointment. * * *. It circumscribes the list of those whom the examining officers are to return * * * as eligible * * *."

In my opinion the first sentence of paragraph "d" of the section must be construed to mean merely that "veterans" take precedence (over those "having the same average percentage") in position upon the list from which certifications are made. And

it only applies to *original appointment* lists, not to promotion lists.

(3) The second sentence of paragraph "d" provides:

"Every veteran shall be entitled to preference in appointment to all positions classified in the labor class in cities without regard to their standing on any such list, provided, however, that disabled veterans shall be preferred over all others on such list."

The legislature, many years ago, determined that merit and fitness for unskilled and certain skilled labor positions could not be determined by examination. (Civil Service Law, section 13, paragraph 4, section 18.) In the state service, no preference among laborers, except to Civil War veterans, was ever allowed. In cities preference was given in chronological order of application. The new provision supersedes the rule of section 18, with respect to the labor class in cities. "Veterans" are preferred above others, and "disabled veterans" above other veterans. This does not violate section 9 of article V of the Constitution, for that provision has no application where, as here, examination is not practicable as a means of determining merit and fitness. But in view of section 2 of Article X, we must hold that this preference only extends to certification from the list, and not to choice by appointing officer among those certified.

(4) Paragraph "e" of section 21b provides:

"In all examinations for original appointment to any competitive position in the state service or in the civil divisions thereof, veterans shall receive additional credits for personal merit, as shown by military training and experience. The civil service commission, by proper rule or regulation, shall fix the comparative ratings to be given to veterans. The weight to be given to personal merit in no case shall exceed twenty per centum of the total weights of the examination."

In construing this paragraph, another excerpt from the opinion of Judge Cardozo is in point. He says:

"it [the legislature] may say that military or naval service (whether in the civil war or elsewhere) is something to be counted by the examiners, like experience in other fields, *whenever service or experience qualifies for office or employment*. [Italics mine.] Service so considered does not override the results of competitive examination; but enters into the results as a contributory factor. A different situation

arises when service controls selection irrespective of qualifying value. It is the difference between an appraisal of merit, an estimate of fitness, and a preference or bonus. The constitution circumscribes the field of privileges and favor."

It follows that the act under consideration here is valid in so far as it provides for additional credits in ratings *for positions in which military service or experience* is a proper factor in determining merit and fitness. Further than this it cannot go. It is obvious that a certain kind of military experience is valuable to a candidate for the position of policeman, fireman or even foreman of labor. Another kind of military experience, *e. g.*, that obtained in an engineering regiment, would be valuable to a candidate for the position of engineer in a highway department. And experience as field clerk in the army or paymaster in the navy would undoubtedly increase the fitness of a candidate for a clerical position. But the statute cannot be held to make it incumbent upon the civil service commissions to give the same credits to all kinds of soldiers and sailors who are candidates for any of "the myriad offices and employments in the civil service." It is left to the commissions to determine the weight to be given to each kind of experience, in each kind of examination, with the sole limitation that in no case shall it exceed twenty per cent of the total weights of the examination.

Albany, July 26, 1921.

CHARLES D. NEWTON,
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by THOS. F. FENNELL,
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TO THE STATE CIVIL SERVICE COMMISSION.

TAX LAW AS AMENDED BY CHAPTER 90 OF THE LAWS OF 1921, SECTIONS 170, 170-A, 170-B, 171 AND 171-A — COMMISSION — DELEGATION OF AUTHORITY.

The powers of the State Tax Commission to hear evidence, take proof and pass upon legal questions in the conduct of the hearings of appeals from equalizations by boards of supervisors, cannot be delegated to a deputy tax commissioner under any provision of the Tax Law, and such duties must be performed by a member or members of the commission.

INQUIRY

May the powers of the Commission to hear evidence, take proof and pass upon legal questions in the conduct of the hear-

ings of appeals from equalizations by boards of supervisors, be delegated to a deputy tax commissioner under any of the provisions of the Tax Law, or must such duties be performed by a member or members of the Commission?

OPINION

Chapter 90 of the Laws of 1921 was an act of twelve sections under and by the provisions of which certain changes were made in article 8 of chapter 60 of the Consolidated Laws, commonly termed the Tax Law. Such changes were effected by the amendment of sections 170, 170-a, 170-b, 170-c, 171; the renumbering of sections 171-a and 171-b of the then existing Tax Law as sections 171-b and 171-c, respectively; the enactment of a new section to be designated as section 171-a; the repeal in its entirety of section 179 of the then existing Tax Law and the substitution in place thereof of a new section designated as section 179, and the addition of another section to article 8 of the Tax Law designated by number as 179-b.

Section 170 as amended by chapter 90 of the Laws of 1921, among other provisions, enacts:

“The president of the commission, shall be the executive head of the commission and shall have sole charge of the administration of the department. The two other members of the commission shall join with the president in exercising the powers and performing the duties specifically imposed by this chapter on the commission as a body. They shall also perform such other duties in the department as the president of the commission may prescribe.”

The organization, classification and duties of subordinates of the Commission are provided for in sections 170-a and 170-b respectively, which read as follows:

“§ 170-a. Subordinates. The president of the commission shall appoint and may remove a secretary. The president of the commission may appoint such deputy tax commissioners, tax assistants, agents, statisticians, experts or other assistants or employees as may be necessary for the exercise of the powers of the commission and the performance of the duties under this chapter, all of whom shall be in the classified civil service; and the president of the commission shall prescribe their duties and fix their compensation, including the duties and compensation of the secretary, which shall not exceed in the aggregate the amount annually

appropriated by the legislature for that purpose. The president of the commission may transfer officers or employees from their positions to other positions in the department, or abolish or consolidate such positions. The president of the commission may remove from office any officer or employee in the department."

"§ 170-b. Divisions or bureaus. Existing divisions or bureaus in the department or transferred to the department shall continue until consolidated or abolished pursuant to this section. The president of the commission may consolidate or abolish divisions or bureaus. Each division or bureau in the department shall be in charge of a commissioner or deputy commissioner subject to the supervision and direction of the president of the commission, and in addition to their respective duties as prescribed in this chapter, each division and bureau and the persons in charge thereof shall perform such other duties as may be assigned to them by the president of the commission."

Section 171, as amended, defines the powers of the State Tax Commission and contains eighteen subdivisions, among such subdivisions being the following:

"Third. Make such reasonable rules and regulations not inconsistent with law, as may be necessary for the exercise of its powers and the performance of its duties under this chapter. * * *

Eleventh. Take testimony and proofs, under oath, with reference to any matter within the line of its official duty. Any member of such commission may be designated for that purpose."

Section 171-a reads:

"§ 171-a. Review by commission. The members of the commission, or a majority of them, shall act as a body in

1. Exercising the powers and performing the duties conferred or imposed by sections one hundred and seventy-five to one hundred and seventy-eight, both inclusive, of this chapter on the tax commission in relation to appeals from decisions of boards of supervisors in the equalization of assessments and corrections of assessment rolls;

2. Exercising the powers and performing the duties conferred or imposed by sections forty-five-a, forty-five-b, forty-five-c, forty-five-d, forty-five-e and forty-five-f of this

chapter on the tax commission in relation to the determination of the final full and equalized valuation of special franchise assessments;

3. Exercising the powers and performing the duties conferred or imposed by articles nine, nine-a and sixteen of this chapter on the tax commission in relation to the revision and resettlement of accounts for taxes under such article, on applications made therefor;

4. Exercising the powers and performing the duties conferred or imposed by section two hundred and sixty of this chapter on the tax commission in relation to the apportionment of mortgage taxes."

Sections 175 to 178 of the Tax Law, mentioned in subdivision 1 of section 171-a above quoted, confers the powers and imposes the duties upon the Tax Commission referred to in the question submitted for opinion herein. Section 176 of the Tax Law, included in the sections of the Tax Law mentioned in subdivision 1 of section 171-a, reads in part as follows:

"The tax commission may prepare a form of petition and notice of appeal from decisions of the board of supervisors in the equalization of assessments and rules and regulations in relation to bringing such appeals to hearing or trial. such rules shall provide for a hearing on the papers and proofs submitted to the board of supervisors on making the equalization, and also for the taking of additional evidence offered by either party."

Sections 175 to 178 of the Tax Law, mentioned in said subdivision 1 of section 171-a set forth in full above, have reference to a matter within the line of the official duties of the Tax Commission.

The duties of and scope of authority of the members of the Commission, its subordinates, and of the Commissioners as a body as determined by the whole of chapter 90 of the Laws of 1921 are as follows:

The president, by virtue of the express terms of the statute, is the executive head of the Commission and shall have sole charge of the administration of the department. In line with his authority as executive head of the department, he is authorized by section 170 to appoint the secretary, and such deputies, assistants, etc., as may be necessary not only to perform the duties of the Commission, but also such as may be necessary to exercise the powers of the Commission.

Section 170-b further confirms the authority of the president as executive head of the Commission by granting him power to supervise such bureau heads as he may appoint and such bureau heads, whether commissioners or deputy commissioners, shall, in addition to the duties imposed upon them by statute, perform such other duties as may be assigned to them by the president of the Commission.

In addition, the president of the Commission, by force of the language found in sections 170 and 171-a of the Tax Law, as amended by chapter 90 of the Laws of 1921, is directly charged with the duty of joining with the other members of the Commission in the performance of the duties relating to review by the Commission of the proceedings enumerated in section 171-a of the Tax Law in its present form. The duties of the other members of the Commission are, by the statute, of a two-fold nature, namely:

1. Those specifically enjoined by the words of the statute requiring that such members shall join with the president in exercising the powers and performing the duties specifically imposed by the act on the Commission as a body, as such specification is found in the new section 171-a of the Tax Law, and
2. Such other duties as the president of the Commission may prescribe.

The duties thus imposed on the president and other members of the Commission by the Legislature, in plain language indicate an intent to charge the members of the Commission or a majority of them with all the duties entailed by the operation of section 171-a of the Tax Law as amended by chapter 90 of the Laws of 1921, and permitted no delegation of this responsibility unless such power of delegation can be found in some other provision of the act. Section 170-a clothes the president of the Commission with the power to appoint deputies and other subordinates of the Commission, but such authority is limited to the exercise of the powers of the Commission itself and the Legislature, having by positive enactment indicated the officials who were to be charged with performance of the duties rendered obligatory by the provisions of section 171-a; a delegation to a subordinate of the commission, by whatever title such subordinate might be designated, to perform said duties, was not within the scope of the power which the president of the commission or the commission itself might exercise under the Tax Law as amended by chapter 90 of the Laws of 1921.

Section 170-b of the Tax Law as amended by Chapter 90 of the Laws of 1921, authorizes the president of the commission generally to continue existing or establish new bureaus, and provides that the persons designated to have charge of the several bureaus, whether commissioners or deputy commissioners, in addition to the duties prescribed by the Tax Law, shall perform such other duties as the president of the commission may assign. The authority to assign duties to the several persons in charge of the bureaus established pursuant to this section can be exercised only within the limits of the authority conferred upon the president of the commission by the whole act itself. The designation of a subordinate of the commission to perform the duties enjoined upon the commission as a body by section 171-a can not be justified by reason of the fact that said duties are performed in conformity with the assignment to such duties by the president of the commission pursuant to the provisions of section 170-b.

Section 171-a of the Tax Law as it existed prior to the enactment of chapter 90 of the Law of 1921, is still in force and is continued in its entirety, being now designated as section 171-b. In part it reads as follows:

“The members of the tax commission, their deputies, secretary or other officer or employee duly designated and authorized by the commission for that purpose shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of the powers or duties of the commission under this article.”

Nothing in this section modified the express provisions of chapter 90 of the Laws of 1921 requiring members of the Tax Commission or the majority of them to act as a body in the review of proceedings mentioned in the four subdivisions of section 171-a of said chapter 90 of the Laws of 1921. Section 9 of the Public Officers Law relating to “deputies, their appointment, number and duties,” by the language of this section is made applicable to “every deputy, assistant or other subordinate officer whose appointment or election is not otherwise provided for. * * *.”

The appointment of deputies and subordinate officers of the Tax Commission and duties of the same are provided for in sections 170-a and 170-b of the Tax Law as amended by chapter 90 of the Laws of 1921, and the extent of authority that can be delegated to the deputies appointed for the purpose of the performance of the duties and exercise of the powers imposed and

conferred by the Tax Law as amended to date are to be gathered from the provisions of the Tax Law as so amended.

None of the provisions of chapter 90 of the Laws of 1921 so far noted would authorize the appointment or designation of any person by the president or any member of the commission to act in the place and stead of the commission or a majority of the commission, in the performance of the duties devolving upon the commission or a majority of them as a body, as such duties so devolve upon the commission or a majority of them by the intent of the Legislature as expressed in the language of sections 170 and 171 of the Tax Law as amended by chapter 90 of the Laws of 1921.

The power granted to the Tax Commission as a body under section 171-a, to make rules, expressly states in the third subdivision of section 171 that such rules are not to be inconsistent with law and nothing in the power to make rules would justify an annulment of the positive assignment of certain definite duties to definite officials by express provision of the Tax Law through the medium of rules and regulations adopted pursuant to subdivision 3 of section 171 of the Tax Law that might provide for the performance of such definite duties by persons other than the officials nominated in the statute itself. With respect to the eleventh subdivision of section 171 of the Tax Law as amended, relating to taking of testimony and proof, etc., set forth in full above, reference to the sixteen articles comprising the Tax Law as amended to date discloses that a review by the Tax Commission and a hearing as an incident to such review are provided for in:

1. Article 2, bearing a sub-title — "Mode of Assessment, the particular sections of such article providing for such hearing being sections 45-a, 45-b, 45-c, 45-d, 45-e and 45-f, pertaining to special franchise valuations.

2. Article 8, sub-title — "Tax Department — State Board of Equalization" contains sections relating to organization of Tax Commission, its powers, etc., and also by operation of sections 175 to 178 provides for hearing and review by the Tax Commission in appeals from equalizations made by boards of supervisors.

3. Article 9, sub-title "Corporation Tax", authorizes a hearing and review by the commission of tax assessed.

4. Article 9-a sub-title "Franchise Tax on Business Corporations"; hearing and review by Tax Commission provided.

5. Article 11, sub-title "Tax on Mortgages", hearing and review provided under section 260 in relation to apportionment of mortgage tax on mortgages covering property within and without the state.

6. Article 16, sub-title — "Taxes upon and With Respect to Personal Incomes"; hearing and review by Tax Commission provided for.

Subdivision eleventh of section 171 of the Tax Law amended by chapter 90 of the Laws of 1921, quoted in full above, relates to the Tax Commission as a body and refers to testimony and proofs taken under oath with reference to any matter within the line of its official duty.

The provisions of sections 45-a, 45-b, 45-c, 45-d, 45-e and 45-f of article 2 of the Tax Law; sections 175 to 178 of article 8 of the Tax Law; article 9-a of the Tax Law; Section 260 of Article 11 of the Tax Law and article 16 of the Tax Law, authorizing a review and hearing by the Tax Commission in reference to the particular matters set forth in these several sections and articles mentioned, impose a corresponding duty to conduct such reviews and hearings upon the Tax Commission in its official capacity, such hearings and reviews being in the line of its official duty.

The new section 171-a of the Tax Law, added by chapter 90 of the Laws of 1921, expressly charges the Commission or majority of them to act as a body in exercising powers and performing the duties conferred or imposed by sections 45-a, 45-b, 45-c, 45-d, 45-e and 45-f of article 2 of the Tax Law (subdivision 2 of section 171-a); sections 175 to 178 of Article 8 of the Tax Law (subdivision 1 of section 171-a); articles 9, 9-a and 16 of the Tax Law (subdivision 3 of section 171-a); and by section 260 of Article 11 of the Tax Law (subdivision 4 of section 171-a.)

The language of that part of section 170 of the Tax Law, as amended by chapter 90 of the Laws of 1921, requiring that "The two other members of the Commission shall join with the president in exercising the powers and performing the duties specifically imposed by this chapter on the commission as a body", was an express regulation that prohibited the delegation of the exercise of any of the powers conferred or performance of any of the duties imposed by section 171-a to persons other than the president of the Commission, and the Commission acting as a body or the majority of them in the absence of some other provision of said act in express and definite terms authorizing such delegation.

The exercise of powers conferred and performance of duties imposed are both included within the express words of the mandate of the Legislature wherein the duties of the president and other two members of the commission or majority of them acting as a body are defined.

The taking of proof and testimony in relation to such proceedings as may be had before the Tax Commission in relation to appeals taken from equalizations by supervisors is a matter within the line of its official duty, and is also a duty imposed by sections 175 to 178 of the Tax Law, and, by force of subdivision 1 of section 170-a, is a duty imposed upon the commission or a majority of them as a body by express provision of law.

Subdivision eleventh of section 171 as amended, is found in the portion of the statute devoted to the definition of the powers and duties of the State Tax Commission and with the first sentence of section 171 would read as follows:

“ § 171. Powers and duties of state tax commission. The state tax commission shall:

eleventh. Take testimony and proofs, under oath, with reference to any matter within the line of its official duty. Any member of the commission may be designated for that purpose.”

The second sentence, granting permission to the designation of a member of the commission to take such testimony and proof under oath, indicates the power to take testimony and proofs included in the first sentence of the subdivision was to be exercised by the commission as a whole; otherwise a designation of a member of said commission to take testimony and proofs would be unnecessary. The testimony and proofs mentioned refer to any matter within the line of the official duty of the commission. All of the proceedings mentioned in the four subdivisions of section 170-a of the Tax Law as now amended are matters within the line of the official duty of the commission, and the permission to designate any member of the commission to take proofs and testimony under oath in any of the proceedings mentioned in the four subdivisions of section 171-a as amended warrants the delegation of the authority to take such testimony and proofs to a member of the commission and authority to conduct the hearing had for the purpose of receiving such testimony and proofs. This subdivision eleventh of section 171 as amended excepts from

the performance of the duties specifically enjoined upon the president and other members of the commission or majority of them acting as a body, in the performance of such duties as may be imposed upon them under the fourth subdivision of section 171-a so much of said duties as require the taking of testimony and proofs.

The Legislature itself has written this exception in the act. The degree of precision which marks the language of the Legislature in defining the duties of the president and other members of the commission in reference to matters mentioned in section 171-a of the Tax Law as amended, also characterized the language of the exception thereto in that it mentions the particular duty that may be delegated and nominates the official by title to whom such delegation may be made, and (by inserting the provision for such delegation under the general powers of the Tax Commission) by whom such designation can be made.

In the construction of statutes the intent of the legislature must be primarily sought in the language of the statute, and if the words employed have a well understood meaning, are of themselves precise and unambiguous, in most cases, no more is necessary than to expound them in their natural and ordinary sense. The words in such case ordinarily best declare the intention of the Legislature.

Smith v. The People, 47 N. Y. 330;
Gillespie v. Zittleston, 60 N. Y. 449;
McKuskie v. Hendrickson, 128 N. Y. 555;
People ex rel. Bockes v. Wemple, 150 N. Y. 302.

The language of the Tax Law as amended imposes a statutory duty upon the president of the commission and the members thereof, or a majority of them, in relation to all proceedings designated in section 171-a of chapter 90 of the Laws of 1921. So much of such statutory duty as involves the taking of testimony and proofs may be discharged by one member of the commission, but this exception is itself a duty imposed by statute upon such member of the commission who may be designated to take such proofs and testimony under oath.

The power to take testimony and proofs does not involve in itself performance of a duty that is purely ministerial in character; it is judicial in its nature, involving the exercise of judgment and discretion.

The courts of this State have expressed an opinion upon the effect of words of a statute imposing a statutory duty upon an official in person and have held that when a statute prescribes certain duties to be performed by a State official in person, such duties cannot be delegated. (*The People v. The Bank of North America*, 75 N. Y. 547.)

In addition it has been uniformly held by the courts of this State that duties, not ministerial in character, but involving the exercise of judgment and discretion, cannot be delegated. (*Powell v. Tuttle*, 3 N. Y. 396; *Board of Excise v. Delaware County*, 35 N. Y. 154; *Birdsall v. Clark*, 73 N. Y. 73.)

In construing the present Tax Law as amended by chapter 90 of the Laws of 1921, it must be presumed that the Legislature enacted this statute with knowledge of the decisions of the courts construing the language used therein, unless it expressly appears that the construction given by the courts was not intended. (*Pouch v. Prudential Insurance Co.*, 204 N. Y. 281.)

There is no language in chapter 90 of the Laws of 1921 that indicates that the Legislature expressly intended that the language of that statute was to receive any other construction than that which the courts would attach to such language as indicated by decisions of the courts rendered prior to its enactment. Accordingly the powers of the State Tax Commission to hear evidence, take proof, pass upon legal questions in the conduct of the hearing of appeals from equalizations by boards of supervisors cannot be delegated to a deputy tax commissioner under any provision of the Tax Law, and such duties must be performed by a member or the members of the commission.

Dated Albany, July 28, 1921.

CHARLES D. NEWTON,
Attorney-General.

By THOMAS F. FENNELL,
First Deputy.

TO STATE TAX COMMISSION, ALBANY, N. Y.

VILLAGE LAW, SECTION 226 — HIGHWAY LAW, SECTION 148.

A village laying a pipe in a highway for the purpose of conducting water into the village water system, must thereafter at its own expense when a Federal aid or State highway is constructed, conform the location of such pipes to a change of grade or deviation of the highway through the old right of way.

Section 148 of the Highway Law requiring the county to acquire title for a State or Federal aid highway does not apply in such a case.

INQUIRY

A village causes water pipes to be laid in a public highway for the purpose of introducing water into and through the village under the authority of section 226 of the Village Law. Subsequently the public highway is improved as a Federal aid highway. The plans call for a slight change in grade and a slight deviation from the center line of the old highway, there being no change however in the existing right of way. Such change in grade and deviation from the center line require a relocation of the village water pipes. Is the village, county or State charged with the duty of relocating such pipes and paying for such work?

OPINION

The village of Greene in the county of Chenango caused water pipes to be laid up the road leading to Oxford, in the year 1903. These water pipes were laid under the authority of section 226 of the Village Law which then read as follows:

"Water pipes in highways outside of village. The board of water commissioners of a village may cause water pipes to be laid, relaid or repaired under any public highway in a county in which any part of such village is situated, or in an adjoining county, for the purpose of introducing water into and through the village; and shall cause the surface of such highway to be restored to its usual condition."

A Federal aid highway is now being constructed and it becomes necessary to change the exact location of such pipes.

It has been frequently decided by the highest courts of this State that a municipal corporation when operating a water system acts not in a governmental capacity, but in the same manner as the proprietor of a corporate business.

Oakes Mfg. Co. v. City of New York, 206 N. Y. 221.

As a result of being placed in the same relative position as that of a private corporation or private individual, a village comes under the general rule which is: when pipes are laid through streets or public highways with the consent of the duly constituted authorities, the owners of such pipes are not exempted from the risk of their location and they may be required to make at their own cost such changes as public convenience or security requires.

Matter of Deering, 93 N. Y. 361.

New York Steam Co. v. Foundation Co., 123 App. Div., at page 263.

Exceptions to this rule exist only under peculiar readings of franchises which are in the nature of contracts, and in such exceptions it appears that the exact and specific location of the easement has been specified. The general rule laid down above seems to be practically uniform throughout the country.

In New Jersey it was held that where a city had by legislative authority laid pipes for a municipal water supply under the streets of a neighboring city, the right of the latter city to grade its streets was unaffected, and that the expense of lowering the pipes necessitated by such grading must fall on the city whose property they were.

Water Commissioners v. Hudson, 113 N. J. Equity, 420.

Vol. 6 of American and English Annotated Cases, 391.

Analogous situations have arisen under section 102 of the Transportation Corporations Law which provides for the erection, construction and maintenance of telephone and telegraph lines over public roads, streets and highways. This section gives permission for such lines subject to the consent of the local authorities. This section, together with section 52 of the Highway Law, imposes a duty upon such operating companies to remove and reset poles, etc., "when the same constitute obstructions to the use of the highway by the traveling public."

In considering these provisions the Attorney-General has held that where the plans for the improvement of any such highway are such as to require relocation of poles and wires, it is incumbent upon the companies at their own expense to relocate the same.

Opinion of Attorney-General, dated March 21, 1913, page 176.

Opinion of Attorney-General, dated September 8, 1904, page 366.

The 1904 opinion was rendered prior to the enactment of section 52 of the Highway Law containing the matter quoted immediately above. This provision in the Highway Law appeared first in chapter 330 of the Laws of 1908. This general principle has been applied in many other states.

Lawyer's Reports Annotated, 1917-D, p. 663.

The question was incidentally discussed in a negligence action in this State.

Bailey v. The Bell Telephone Co., 147 App. Div. 224.

The owner of property abutting upon a highway which is graded or changed by the public authorities has no right of action nor any right of damages unless such right is given by some express statute. At common law there is no such liability.

Smith v. Boston & Albany R. R. Co., 181 N. Y. 132.
New York Municipal Railway Corporations v. Weber,
226 N. Y. 70.

Matter of Bayers, 140 App. Div. 735.

While all of these cases and many others which could be cited relate to abutting owners, it would appear that the principle would apply to easements in the highway.

The village can have no claim for damages here for the reason that there is no statute authorizing the payment thereof. The only possible authority is section 59 of the Highway Law which applies to town highways only.

My attention has been directed to section 148 of the Highway Law, which provides as follows:

"Acquisition of lands for right of way and other purposes.

If a state or county highway, proposed to be constructed or improved as provided in this article, or which shall have been heretofore constructed, or which it is proposed to repair or reconstruct as provided in article seven of this chapter, or in which it is proposed to change the course of a dangerous section thereof, shall deviate from the line of a highway already existing, the board of supervisors of the county where such highway is located, shall acquire land for the requisite right of way prior to the advertisement for proposals. The board of supervisors may also acquire lands for the purpose of obtaining gravel, stone or other material, when required for the construction, reconstruction, improvement or maintenance of highways, or for spoil banks, together with a right of way to such spoil banks and to any bed, pit, quarry, or other place where such gravel, stone or other material may be located."

This section plainly indicates that county boards of supervisors are only required to acquire lands for rights of way when it be-

comes necessary to run a portion of the improved highway over private land. There would, of course, be no necessity of acquiring right of way when the traveled portion of the newly constructed highway merely enters upon a part of the former untraveled portion.

“ It is a rule of the common law that all legislative grants of privilege are to be liberally interpreted in favor of the public, and strictly interpreted against the grantee. * * * In this country the rule is particularly applicable to grants of special franchises and privileges to corporations, such grants being frequently expressed in the language of the grantees and passed upon their solicitation and primarily for their benefit. A grant of public lands, though not construed so strictly as to defeat the intent of the Legislature or withhold what is given either expressly or by fair implication, is nevertheless not liberally construed.”

1 *McKinney's Consolidated Laws of New York*, page 207.

Under this rule of construction it cannot be reasonably inferred from section 226 of the Village Law that the Legislature ever intended to give such a right in the highway as might interfere with future road improvement. It is entirely reasonable to say that they did intend to give a permanent easement for the village water pipes, but they did not intend to let them stay in any exact location, if subsequent improvements to the road were made.

I, therefore, reach the conclusion that the village of Greene is required to conform the location of its water pipes in the Greene-Oxford highway to the change in grade and deviation from the old center line, and that the expense thereof should be paid by such village.

Dated, Albany, August 4, 1921.

CHARLES D. NEWTON,
Attorney-General.

By THOMAS F. FENNELL,
First Deputy.

To: HON. HERBERT S. Sisson, *State Commissioner of Highways, Albany, N. Y.*

STENOGRAPHERS — FEES — CODE OF CIVIL PROCEDURE, SECTION 3311 — TAX LAW, SECTIONS 229, 234 — STATE TAX COMMISSION.

The provisions of the Code of Civil Procedure, specifying the sums which stenographers may lawfully demand and receive, pertain to official stenographers of the courts only, and such provisions cannot by implication be extended to include any of the employees of the State Tax Commission.

INQUIRY

Do the provisions of the Code of Civil Procedure, pertaining to the charges by court stenographers for minutes of hearings apply to stenographers or employees of the State Tax Commission?

OPINION

The provisions of law relative to the fees that may be lawfully charged by stenographers in the several courts of the State are found in the Judiciary Law and in the Code of Civil Procedure.

Section 303 of the Judiciary Law reads as follows:

“Stenographers must furnish copies of proceedings to parties on payment of fees. Each stenographer specified in this chapter of the code of civil procedure, must, upon request, furnish, with all reasonable diligence, to the defendant in a criminal cause, or a party, or his attorney in a civil cause, in which he has attended the trial or hearing, a copy, written out at length from his stenographic notes, of the testimony and proceedings, or a part thereof, upon the trial or hearing, upon payment, by the person requiring the same of the fees allowed by law.”

The authorization to charge fees as far as this section confers such authority, is limited to the stenographers specified in chapter 30 of the Consolidated Laws, being commonly known as the Judiciary Law or stenographers specified in the Code of Civil Procedure. The amount of fees to be exacted by stenographers lawfully entitled to demand the same is ascertained by a reference to such fees as are allowed by law.

Section 290 of the Judiciary Law reads as follows:

“Stenographers are officers of court. Each stenographer, specified in this chapter of the code of civil procedure is an officer of the court or courts, for or by which he is appointed.”

Section 294 of the Judiciary Law provides:

“Stenographers of courts must file oath of office. Each stenographer specified in this chapter of the code of civil procedure, before entering upon the discharge of his duties,

must subscribe the constitutional oath of office, and file the same in the office of the clerk of the court, or, in the supreme court, in the office of the clerk of the county where the term sits, or the judge resides, by which or by whom he is appointed."

By force of section 304 of the Judiciary Law the provisions of said law relating to stenographers are made applicable to assistant stenographers.

The stenographers mentioned in the said Judiciary Law are those appointed for duties connected with the Supreme Court and the Appellate Division thereof and the County Courts. Section 266 of the Code of Civil Procedure provides for a stenographer for the Court of Claims.

Section 332 of the Code of Civil Procedure provides for a stenographer for the City Court of New York. Section 2495 of the Code of Civil Procedure provides for the appointment of a stenographer by the surrogate of each of the counties of New York, Kings, Erie, Albany, Westchester, Monroe and Queens. Section 2496 of the Code of Civil Procedure authorizes the surrogates of the several counties of the State, other than the counties of New York, Kings, Bronx, Albany, Westchester, Hamilton, Queens, Richmond, Monroe and Erie, to appoint and at pleasure remove a stenographer. Section 2497 of the Code of Civil Procedure reads as follows:

"Duties of stenographer. The stenographer of the surrogate's court must under the direction of the surrogate, take full stenographic notes of all proceedings in which oral proofs are given except where the surrogate otherwise directs. The testimony must be legibly written out at length by him from his minutes, when required by the surrogate; and the minutes thereof as so written out must, after being authenticated, as prescribed in the next section, be filed in the surrogate's office, and in all cases his stenographic books must be so filed and remain in the surrogate's office, five years."

A provision is made by law for the payment of fees of stenographers appointed pursuant to section 2496 of the Code of Civil Procedure, which section excepts the stenographers appointed by the surrogates of the respective counties of New York, Kings, Bronx, Albany, Westchester, Hamilton, Queens, Richmond, Monroe and Erie, in section 2500 of the Code of Civil Procedure, which reads as follows:

“ Fees of stenographer acting or taking testimony in surrogate’s court. A stenographer, appointed or acting pursuant to sections 2496 and 2497 of this act, may charge and receive a sum not exceeding six cents per folio for furnishing a copy of the minutes, proceedings and testimony taken in surrogate’s court to any person who applies for the same.”

Article 5 of chapter 21 of the Code of Civil Procedure is devoted to regulating the amount of fees of officers mentioned throughout such Code generally and section 3311 as found in said article 5 of chapter 21 of the Code of Civil Procedure reads as follows:

“ Stenographer’s fees. Except where otherwise agreed or when special provision is otherwise made by statute, a stenographer is entitled, for a copy fully written out from his stenographic notes of the testimony, or any other proceeding, taken in an action, or a special proceeding in a court of record, or before a judge or justice thereof, and furnished, upon request, to a party or his attorney, to the following fees for each folio: In a trial or special term of any court, ten cents; and for the copy of the testimony, required to be made in any proceeding for the record of the surrogate’s court of the counties of New York, Bronx, Kings and Erie, ten cents; and the surrogate may order that the fees for such record copy be paid out of the estate to which the proceeding relates.”

This section last quoted has been construed as pertaining to official stenographers only. (*Eckstein v. Schleimer*, 116 N. Y. Supp. p. 7.)

Article 10 of chapter 6 of the Consolidated Laws, commonly known as the Tax Law, provides for taxes assessed upon taxable transfers and comprises sections 220 to 225, both inclusive, of said Tax Law. The stenographers appointed pursuant to the provisions of section 229 or 234 of the Tax Law, being chapter 60 of the Consolidated Laws, as said chapter now reads by virtue of the amendments contained in chapter 90 of the Laws of 1921 and chapter 476 of the Laws of 1921, are employees of the State Tax Commission and are subject in the discharge of their respective duties to such regulation as the Tax Commission or the president of the Tax Commission may prescribe. In no sense can they be termed official stenographers of the surrogate’s court. Provision for their appointment is found solely in the Tax Law.

The provisions of the Judiciary Law pertaining to stenographers, quoted above, in express terms are limited to the stenographers specified in the Judiciary Law and in the Code of Civil Procedure.

The provisions in the Code of Civil Procedure specifying the sums which stenographers may lawfully demand and receive pertain to official stenographers of the courts only and such provisions cannot by implication be extended to include any of the employees of the State Tax Commission.

Dated, August 8, 1921.

CHARLES D. NEWTON,
Attorney-General.

By THOS. F. FENNEL,
First Deputy.

To STATE TAX COMMISSION, Albany, N. Y.

STATE TREASURER—FINES PAID TO HIM BY CONSERVATION COMMISSION—
REFUNDING—WHERE FINES FOR VIOLATION OF THE CONSERVATION LAW
HAVE BEEN PAID OVER BY THE CONSERVATION COMMISSION TO THE STATE
TREASURER, THEY MAY NOT BE REFUNDED TO THE PERSON PAYING SUCH
FINES UPON THE REVERSAL OR MODIFICATION OF THE JUDGMENT OF CON-
VICTION, EXCEPT BY APPROPRIATION OF THE LEGISLATURE.

INQUIRY

Can the State Treasurer upon a certified copy of an order of the County Court, by which a judgment of conviction of violation of the Conservation Law is modified so as to reduce the fine of a defendant from one hundred dollars to twenty-five dollars and as thus modified affirmed, pay to such defendant the difference between the fine imposed and the amount thereof as modified when such fine has been paid over to the State Treasurer by the Conservation Commission prior to the making and entry of the order modifying the judgment of conviction.

OPINION

The Conservation Commissioner and the State Treasurer have requested my opinion upon the above inquiry.

On the 13th day of February, 1921, three defendants were convicted by a Court of Special Sessions held by a justice of the peace for a violation of section 176 of the Conservation Law and each of them fined one hundred dollars. Upon appeal from such

judgment of conviction, on the 15th day of July, 1921, the County Court made an order modifying such judgment of conviction by reducing each fine from one hundred dollars to twenty-five dollars and affirming the judgment of conviction as thus modified. The order of affirmance further provided:

“that the treasurer of the State of New York or other officer holding said fine upon the service upon him of a certified copy of this order pay”

to each of the defendants the sum of seventy-five dollars, the difference between the fines as originally imposed and the amount thereof as prescribed by the order modifying and affirming the judgment of conviction. After the judgment of conviction and before the order of the County Court upon the appeal therefrom, the Conservation Commission had remitted to the State Treasurer the amount of the fines received by it paid upon such judgment of conviction, and such moneys had been covered into the general fund of the treasury of the State.

The inquiry is: Can the State Treasurer pursuant to the direction of such order pay over to the defendants the amounts prescribed thereby?

Section 29 of the Conservation Law provides that:

“* * * fines for violation of any of the provisions of said article shall be paid within thirty days after receipt thereof to the Commission.”

It then permits the application by the Commission of so much of such fines as is necessary to the payment of certain expenses but makes no provision for the disposition of the balance, if any, of such fines. However, by section 37 of the State Finance Law, it is provided that:

“every state * * * commission * * * receiving money for or on behalf of the state from * * * fines * * * shall on the fifth day of each month pay to the state treasurer all such moneys received during the preceding month” * * *.

Article III, section 21, of the Constitution, so far as pertinent, provides:

“No money shall ever be paid out of the treasury of this State or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law.”

The law clearly provides that moneys collected by magistrates for fines for violation of the Conservation Law shall be paid over to the Conservation Commission (Conservation Law, section 29) and in turn that that Commission shall pay over such moneys, except such portion thereof as are applied to the payment of the collection of fines or the compensation of special game protectors to the State Treasurer, on or before the fifth day of the month succeeding their collection (State Finance Law, *supra*). These moneys then become funds of the State and may not be disbursed by the treasurer except in conformity to article III, section 21, of the Constitution above quoted.

This department in 1911 rendered an opinion to the Secretary of State in which it held that the Secretary of State, in his discretion, might refund to persons applying for chauffeurs' licenses, and whose application was denied, license fees paid by them into the State Treasury through the Secretary of State's office, and that the Comptroller might draw a warrant for such amounts upon the theory that such money was paid into the treasury by mistake and were not state funds within the meaning of the Constitution. In that opinion however was quoted section 4 of the State Finance Law as it then read:

"Whenever the comptroller shall be satisfied that moneys have been paid into the treasury through mistake, he may draw his warrant therefor on the treasurer, in favor of the person who may have made such payment; but this provision shall not extend to payments on account of taxes, nor to payments on bonds and mortgages."

It is significant as bearing on the question now before us that section 4 of the State Finance Law has been radically amended since that opinion was rendered by eliminating the provision above quoted and providing in lieu thereof:

"The Comptroller shall:

* * * * *

5. Draw warrants on the Treasurer for the payment of the moneys directed by law to be paid out of the treasury, but no such warrant shall be drawn unless authorized by law, and every such warrant shall refer to the law under which it was drawn."

The discretion vested in the Comptroller in 1911 thus seems to have been withdrawn and the statute regulating his duties made mandatory.

I am of the opinion, therefore, that when fines collected under the Conservation Law have been paid to the State Treasury pursuant to law they become the funds of the State and may not be paid out of the treasury except upon an appropriation by an act of the Legislature. I advise that the order directing the State Treasurer to pay over such moneys is nugatory.

The remedy of the claimants is either by special appropriation covering their cases or by resort to the Court of Claims. The latter course, however, would seem to be superfluous as the amount due them is definitely and finally fixed.

Dated, August 22, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO HON. ELLIS J. STALEY, *Conservation Commissioner*, and HON.
N. MONROE MARSHALL, *State Treasurer*.

VITAL STATISTICS — ARTICLE 26 — PUBLIC HEALTH LAW — PUBLIC HEALTH
COUNCIL — AUTHORITY TO REGULATE.

Under the provisions of the Public Health Law, the Public Health Council has authority to adopt rules and regulations defining under what circumstances the records of the division of vital statistics in the State Department of Health may be inspected, and transcripts from such records or searches thereof shall be made, where such rules and regulations have for their aim that the purposes of the law in establishing a division of vital statistics shall be fully subserved, but not subverted, and in particular have the authority to provide that no inspection, transcript or search of any such records shall be made without facts being disclosed to indicate that the application for such inspection, transcript or search is for a legitimate purpose. Public Health Law, section 391; Public Officers Law, Section 66.

By virtue of the provisions of section 391 of the Public Health Law and section 66 of the Public Officers Law, the duty to furnish a transcript of the records of the Division of Vital Statistics in the State Department of Health, or search said records is a mandatory duty imposed upon the commissioner of health. Where the application for such a transcript or search is made by a person lawfully entitled thereto. The records from which a transcript may be lawfully required or a search made include all the records now under the dominion and control and supervision of the State Department of Health, as records of vital statistics, filed or recorded since the enactment of chapter 322 of the Laws of 1880, whereby the State Board of Health first was constituted and provision made in said chapter for the establishment at the capital of the state of a central bureau of vital statistics.

The fees for a certified copy of a record of any birth or death or for any search of the files or records where no certified copy is made, specified in section 391 of the Public Health Law, are properly chargeable for certified copies of any record or for searches of all of the records and files of the Division of Vital Statistics in the State Department of Health, collected and recorded since the enactment of chapter 322 of the Laws of 1888.

There are no fees expressly allowed by law for a certified copy of or search of the records of marriages in the state department of health. Therefore by virtue of the provisions of section 66 of the Public Officers Law, the State Commissioner of Health is entitled to charge and receive for a certified copy of any of the marriage records, or a search of the marriage records in the State Department of Health fees at the same rate allowed by law to a county clerk for a similar service, and construing sections 3304 and 3305 of the Code of Civil Procedure with section 66 of the Public Officers Law, the State Commissioner of Health is authorized to charge for a certified copy of a marriage record at the rate of eight cents per folio with a minimum fee of twenty-five cents and for a search of the marriage records of the State Department of Health is entitled to a fee of five cents a year for each name searched against.

PUBLIC HEALTH LAW, SECTION 370 — REGISTRARS' DUTY TO CONFORM TO REGULATIONS OF THE PUBLIC HEALTH COUNCIL.

Section 370 of the Public Health Law, by its express terms, renders it obligatory upon the part of all registrars to conform to any and all regulations, which the Public Health Council might adopt in connection with the registration of births and deaths, and such regulations as the Public Health Council might adopt relative to the inspection or certification of transcripts from or searching of the records of births and deaths would include such records in the offices of the local registrars.

GENERAL MUNICIPAL LAW, SECTION 51 — DOMESTIC RELATION LAW, SECTION 19 — CITY, TOWN AND COUNTY CLERKS — AUTHORITY WITH RESPECT TO ISSUING TRANSCRIPTS FROM OR INSPECTION OF MARRIAGE RECORDS.

Construing section 19 of the Domestic Relations Law and section 51 of the General Municipal Law together, a city, town or county clerk may make regulations with respect to the issuing of transcripts from, or the inspection of the records in their respective offices relating to marriages as may insure that such transcripts be issued, or inspection made for a legitimate purpose, and not merely for the gratification of curiosity or for speculative purposes.

INQUIRY

May the Public Health Council establish regulations relating to the conduct of the Division of Vital Statistics in the State Department of Health, with respect to the issuing of transcripts of the records of births, marriages and deaths and for searches of the records of births, marriages and deaths and inspection of such records generally?

Are the rules and regulations of the Public Health Council relating to the issuing of transcripts from or searches of the records of births and deaths in the offices of local registrars, binding upon local registrars?

To what fee is the State Commissioner of Health entitled for a certified copy of or search of the marriage records in the State Department of Health?

Is it discretionary upon the part of the State Commissioner of Health to supply a certified copy of a record filed or recorded in the Division of Vital Statistics in the State Department of Health or make a search of such records, or is the supply of such certified

copy of search of the records of the Division of Vital Statistics in the State Department of Health a mandatory duty when the application therefor is made by a person lawfully entitled thereto?

Are the records referred to in section 391 of the Public Health Law, such records as have been compiled since Article 20 of the Public Health Law went into effect, that is since January 1, 1914, or does such reference include all the items of record relating to births and deaths filed or recorded since the establishing at the capital of the State of a central bureau of Vital Statistics pursuant to the provisions of chapter 322 of the Laws of 1880?

Is the State Commissioner of Health entitled to a fee for a transcript of or search of the records of births or deaths filed or recorded prior to the time Article 20 of the present Public Health Law took effect?

What authority have the city, town or county clerks to prescribe regulations respecting the issuing of transcripts from or inspection of the marriage records in their respective offices?

OPINION

The Legislature in 1847 by a general statute undertook to provide a permanent registry of marriages, births and deaths with the State of New York. Section 1 of chapter 152 of the Laws of 1847 reads as follows:

“Section 1. The clerks of the several schools districts of this State organized according to law, and where there shall be no clerk, or he shall be incapable of acting, the trustees or one of them of such district shall annually, on or before the fifteenth day of January in each year, ascertain from the most accurate means of information in their power, and report in writing to the town clerk of the town, or one of the aldermen of the ward in which the schoolhouse of their district shall be situated, or in the City of New York, to the City Inspector, under appropriate heads, and in such forms as shall be prescribed by the secretary of State, the number of births, marriages and deaths which have occurred in their districts respectively during each year preceding the first day of January, the month and day of their occurrence the names and residences of the persons so married or dying and the names of the parents of such children born during the year, the sex, color and names of the children, name and residence of the officer or clergyman performing the marriage ceremony in

cases of marriage, the age of the person who shall have married or died during the year aforesaid, and the particular disease or cause of their death. The report of all marriages and births in the city of New York shall be reported direct to the city inspector, and in case there is no physician or midwife in attendance at any birth, then the parents shall be required to report to the city inspector within one month, and all deaths in the city of New York shall be reported to the city inspector as at present, every week."

It was made the duty of the town clerk, or alderman receiving such report to record the same in a book provided for that purpose and within fifteen days after such receipt transmit a copy thereof or an abstract thereof in such form as the secretary of State might prescribe to the county clerk or city inspector, whose duty it was, within fifteen days after the receipt thereof, to forward an abstract duly certified by him in such form as the secretary of State might prescribe to the secretary of State who was required to file the same in his office, make a complete abstract thereof, and transmit the same to the Legislature as soon as might be practicable thereafter.

Section 3 of said chapter 152 of the Laws of 1847 reads as follows:

"§ 3. It shall be the duty of clergymen, magistrates and other persons who perform the marriage ceremony, to keep a registry of the marriages celebrated by them, and to ascertain as far as practicable and note the ages of the persons married and the time thereof, and their places of birth and their residences in such registry. It shall also be the duties of physicians and professional midwives to keep a registry of the several births in which they have assisted professionally, and the time of such birth, sex, color and the residence of the parents; and physicians who have attended deceased persons in their last sickness, clergymen who have officiated at the funeral and sextons who have buried deceased persons, and keep a registry of the name, age and residence of such deceased persons, and the times of their deaths. It shall be the duty of such physicians, magistrates, clergymen and sextons to allow the clerks of the school district within which they respectively reside, to inspect such registries from time to time, and to furnish them such information in their power as may be necessary to enable such clerks to make the returns by this act."

By the terms of the statute above mentioned, the record of such matters as pertained to vital statistics, as far as a state record was concerned, was to be in charge of the Secretary of State, who was to provide the forms to be used and his office was the repository of the records of the entire State, of the statistics returned and reported under the provisions of this act.

Chapter 75 of the Laws of 1853 provided for the registry of births, marriages and deaths in the city of New York and it repealed so much of chapter 152 of the Laws of 1847 as was inconsistent therewith.

It made provisions for the reporting to the city inspector by clergymen, physicians, professional midwives and coroners of matters pertaining to vital statistics. The city inspector in turn was to make a record of all matters so reported to him, and on the third Monday of each month was required to transmit an abstract of his registry of marriages, births and deaths, for the month next preceding to the Secretary of State. The Secretary of State was to provide the blank forms necessary to carry out the provisions of the act and accompany the same with proper instructions and explanations, receive such returns from the city inspector of the city of New York, and prepare from them such tabular results, with remarks thereon, as would render them of practical utility and make a report thereof annually to the Legislature.

State supervision of vital statistics collected under this last-mentioned statute was maintained through the office of the Secretary of State.

In 1859 an effort was made to secure a uniform system of registration of vital statistics throughout the State and to that end the Committee on Medical Colleges and Societies of the Assembly made a report and recommended for passage an act to secure the registration of births, marriages and deaths, which proposed act provided for the appointment by the recorder of the city of New York and by the county judge of each of the other counties of the State a registrar in each town and ward whose business it was to ascertain, by such means as were designated in the various sections of the act, the facts relating to all the births, marriages and deaths, occurring in their respective towns and wards, and form out of them a local town or ward registry. The registrars were to be assisted in the performance of their labors by the persons who had the best opportunities to obtain an accurate account of the matters to be recorded, viz., the physician, midwife

or other person who shall have had professional charge of the mother at the period of the birth; the clergyman or officiating officer at the solemnization of the marriage and the physician who attended the deceased person at the time of the death. These persons were respectively required to report, under a pecuniary penalty or forfeiture for neglect or refusal to perform the duty assigned to them, and clearly described in the said act, and on the other hand a small fee was granted for the services demanded of them by the act. The reports required were to be made monthly in the cities and quarterly in the rural districts, to the local registrars and by them entered upon books prepared for the purpose in a systematic manner. At the end of the quarter in the wards, and of the year in the towns, this record was to be thoroughly examined and corrected, and a full and perfect copy of the same transmitted to the county clerk, who was to enter it upon his book for a county record. These copies were to be verified upon the oath or affirmation of the registrar transmitting such copy, and any falsification of either copy or original record or of any primary certificate, was made a misdemeanor, punishable with fine or imprisonment. An abstract of such copies was to be promptly prepared by the county clerk and forwarded to the Secretary of State, there to be rearranged in a convenient and methodical form. The Secretary of State was required to collate these abstracts and to construct such tables as would best exhibit the general results and promote the objects of the proposed law. An annual report to the Legislature was directed to be made of the workings and results obtained through the operation of the law with such suggestions as might be deemed fitting. (*Assembly Documents, 1859, vol. 5, No. 157.*) The act so recommended failed of passage.

In 1864 another act was passed to provide for the registration of deaths in the several towns and wards of the State. Chapter 380 of the Laws of 1864 read in part as follows:

“§ 1. It shall be the duties of the assessors in every town and ward in this state, at the time of taking their annual assessments, to ascertain by diligent inquiry of every family of his ward or district, whether any death has occurred in said family or neighborhood within the year ending on the thirty-first day of December then next preceding; and in case any death having occurred, it shall be his duty to ascertain by the best authority within his reach, the date of such death, together with the age sex, color, occupation and

nationality of such deceased, and the reputed disease or cause of such death, and to record the same in a book provided for that purpose. And upon the completion of his record, it shall be his duty to deposit the same in the office of the town or city clerk, on or before the day of the first annual meeting of the assessors for a review of their assessment rolls."

By virtue of other provisions of this last-mentioned act it became the duty of the town or city clerk to copy each such record deposited in his office into a book provided for that purpose and kept by him for safety and future reference. It was also his duty to deposit a copy of the same on or before the day of the first annual meeting of the board of supervisors for that year, in the office of the county clerk or officer performing the duties of that office.

The county clerk was required to enter all such copies in a book of record prepared for that purpose for said county on or before the first day of January next succeeding and to transmit a copy of such record within ten days thereafter to the office of the Secretary of State.

It was made the duty of the Secretary of State to prepare suitable blanks and books for the carrying out of the provisions of this act and to cause the same to be forwarded to the assessors by the first day of June, 1864, and annually thereafter by the first day of April in each year and to the county clerk by the first day of November in each year, and to report to the Legislature the annual mortuary statistics of the State by the first day of February in each year.

This last-mentioned statute was repealed in its entirety by chapter 723 of the Laws of 1865.

A general statute was enacted in 1850, entitled "An act for the preservation of the Public Health," being chapter 324 of the Laws of 1850. The cities of New York and Brooklyn were excepted from the operation of the provisions of this statute.

Under the terms of this statute it was the duty of the common council of every city and the board of trustees of every incorporated village, where there was not a board of health duly organized to appoint once in each year a board of health for such city or village to consist of not less than three nor more than seven persons, and a competent physician to be the health officer thereof. It was further enacted that the supervisor and justices of the peace, or the major part of them of each town in the State, should be a board of health for such town, for each year, whenever in the opinion of

the majority of such board, the public good required it, and they were authorized to appoint some competent physician to be the health officer of the town. The powers and duties of the several boards of health to be organized under such act were defined in detail. The collection and record of matters pertaining to vital statistics was not mentioned in this act.

This last mentioned act was amended by chapter 169 of the Laws of 1854 and chapter 790 of the Laws of 1867. Neither of these two amendatory acts, in fact no act of the Legislature up to the year 1881, amending said chapter 324 of the Laws of 1850, entitled "An act for the preservation of the public health," made any reference to the collection and record of data properly items of vital statistics.

In 1880 there was enacted a statute, entitled "An act to establish a State Board of Health," being designated by number as chapter 322 of Laws of 1880. Said statute read in part as follows:

"Section 1. Within twenty days after the passage of this act, the governor shall appoint by and with the consent of the Senate, three State commissioners of health, two of whom shall be graduates of legally constituted medical colleges, and of not less than seven years practice of their profession. The said commissioners together with the attorney-general, the superintendent of the State survey and the health officer of the Port of New York, who shall be ex-officio members of the State board of health, and three other persons to be designated and appointed by the governor, one of whom shall be a commissioner of health of the board of health of the city of New York, and the others shall be members or commissioners of health of regularly constituted and organized boards of health of cities of the State, shall constitute the board of health of the State of New York. * * *."

"§ 6. * * * . It shall be the duty of said board to obtain, collect and preserve such information relating to deaths, diseases and health as may be useful in the discharge of its duties and contribute to the promotion of the health or the security of life in the State of New York. * * *."

"§ 7. It shall be the duty of the State board of health to have the general supervision of the State system of registration of births, marriages and deaths, and also the registration of prevalent diseases. Said board shall prepare the necessary methods and forms for obtaining and preserving such records, and to insure the faithful registration of the same in the sev-

eral counties and in the central bureau of vital statistics at the capitol of the State. The said board of health shall recommend such forms and amendments of law as shall be deemed to be necessary for the thorough organization and efficiency of the registration of vital statistics throughout the State. The secretary of said board of health shall be the superintendent of registration of vital statistics of the State. As supervised by the said board, the clerical duties and safekeeping of the bureau of vital statistics, thus created shall be provided for by the comptroller of the State, who shall also provide and furnish such apartments and stationery as said board shall require in the discharge of its duties. * * *."

§ 11. It shall be the duty of said board, on or before the first Monday of December in each year, to make a report in writing to the governor of the State, upon the vital statistics and the sanitary condition and prospects of the State; * * * and shall suggest any further legislative action or precautions deemed proper for the better protection of life and health. * * *."

Chapter 482 of the Laws of 1875 was an act conferring upon boards of supervisors further powers of local legislation and administration. Said act was amended by chapter 512 of the Laws of 1880, which amendatory act read as follows:

"Registration of Marriages, Births and Deaths. 31 — To provide for the registration in the clerk's office in each town and village in the county, of every marriage, birth and death, which may occur in said town or village; such registration to be made upon the report, within three days of the event of the attending clergyman, magistrate or physician, such registration to be made in books of record, properly bound, lettered, paged, ruled, printed, indexed, and prepared for that purpose, and furnished whenever necessary, and upon a written demand of the said clerk, by the board of supervisors to each town or village; the expense of which books shall be a proper county charge to be paid for as a charge in the general expenses of the county. Such books shall be so ruled and printed that sufficient space shall be had between the lines and columns of each page thereof, to clearly and fully record the date, name, residence, locality, giving the street and number, if possible, age and disease of each person dying; and the name or names, color, age and nationality of every person married, and the date thereof; and the name or names of the parent or parents together with the sex, color, date and place of birth of each child so born."

"33. To fix the amount and provide for the payment of the registration fees in all such cases as aforesaid, and to provide for obtaining copies of such records, and for the amount and payment of fees for such copies. Such copies duly attested by said town or village clerk shall be admitted in all the courts of this state as prima facie evidence of the facts therein set forth."

The supervision of the State Board of Health in relation to vital statistics was reviewed in the first report of said board made pursuant to law under date of December 1, 1880, and from said report their construction of the then existing statutes pertaining to the record of vital statistics, was that the registration of births, marriages and deaths was recognized and defined as a public duty by the operation of three separate laws, viz: Chapter 152 of the Laws of 1847; chapter 512 of the Laws of 1880, and chapter 322 of the Laws of 1880 by the seventh section thereof, all of which statutes are mentioned and in part quoted above. (Assembly Documents 1881, Vol. 3, No. 29.)

Chapter 324 of the Laws of 1850 entitled "An act for preservation of the public health," was amended by chapter 431 of the Laws of 1881. This amending act was not applicable to the cities of Brooklyn, New York or Buffalo. Among its provisions was the following:

"* * * It shall also be the duty of the board of health in each town, village and city in this state, to have the supervision of the registration of deaths, diseases and the causes of death, and by its appointed officers, to examine all certificates and records of death and findings of coroner's juries
* * * and it shall be the duty of every such board of health to supervise and make complete the registration of births, deaths and marriages, within the limits of its jurisdiction; * * * but the town clerks and the registering clerks provided by law in villages and cities may still keep all records of births, deaths and marriages as required by chapter five hundred and twelve of the laws of eighteen hundred and eighty."

All acts and parts of acts inconsistent with this act were repealed.

So much of chapter 431 of the Laws of 1881 as was last quoted was amended by chapter 351 of the Laws of 1882 entitled as an act supplemental to said chapter 431 of the Laws of 1881 by the addition to the words quoted the following:

"and in any place in this state in which the state board of health ascertains that such registration is not completely and well made, said state board shall notify the local board of health and the registering clerk, whose duty it is to make the registration in such place, that within three months of the date of such notice, said defects and neglect in the records must be amended and presented. If at the expiration of the time mentioned, said defects and neglect are not overcome, it shall be the duty of the state board of health to take such control of, and adopt such means for causing compliance with rules and regulations for the said records as will secure their completeness and proper registration within the limit of the cost hereinbefore specified, and until such local officers shall agree to and actually make the said records and registry complete as required by law. * * *"

By force of chapter 431 of the laws of 1881, boards of health organized under the general act, chapter 324 of the Laws of 1850 were charged with the duty of maintaining a local bureau of vital statistics and by operation of chapter 351 of the Laws of 1882, this local bureau of vital statistics was subjected to the supervision of the State Board of Health.

A general act for the preservation of the public health and the registration of vital statistics was passed in 1885, designated as chapter 270 of the Laws of 1885. The cities of New York, Buffalo, Albany, Yonkers and Brooklyn were excepted from the operation of the act. In general it provided for the establishment of a board of health in each city and town in the State, and for the appointment by such several boards of health of a competent person as the health officer thereof and prescribed the powers and duties of the boards of health so organized and constituted.

By subdivision 5 of section 3 of said act provision was made for the registration of vital statistics as follows:

"The several boards of health now organized in any city, village or town in this state (except in the cities of New York, Brooklyn and Buffalo) and the several boards of health constituted under this act shall have the power and it shall be their duty:

* * * * *

5. To supervise and make complete the registration of all births, marriages and deaths occurring within the limits of its jurisdiction in accordance with the methods and forms prescribed by the state board of health, and to secure the

prompt forwarding of the certificate of birth, marriage and death to the state bureau of vital statistics after local registration. * * * And to secure the completeness of the said registration it shall be the duty of the parents or custodian of any child, and the groom at every marriage, or the clergyman or magistrate performing the ceremony to secure the return of the record of such birth or marriage to the board of health or person designated by them within thirty days from the date of such birth or marriage, and each record shall be duly attested by the physician or midwife (if any) in attendance at such birth, or the clergyman or magistrate officiating at such marriage. And it shall be the duty of the health officer of every such board of health to receive and examine and secure the registration of all certificates and records of death and causes of death and findings of coroner's juries, * * * and it shall be the duty of the undertaker, sexton or other person having charge of the body of any dead person to procure a record of the death and its probable cause duly certified by the physician in attendance on the deceased during his last illness, or the coroner where an inquest is required by law."

There was also incorporated in said subdivision 5 of section 3 of this act the provision for the supervision of the record of vital statistics by State Board of Health contained in chapter 351 of the Laws of 1882 as hereinbefore quoted. By section 9 of chapter 270 of the Laws of 1885, chapters 152 of the Laws of 1847, 324 of the Laws of 1850 and the several acts amendatory thereof, chapter 512 of the Laws of 1880 except subdivision 34 of section 1 of said act, and all other acts or parts of acts, general or special, inconsistent with the provision of chapter 270 of the Laws of 1885 were repealed.

The effect of chapter 270 of the Laws of 1885 by operation of the provisions contained therein and laws repealed thereby, was that the regulation of the collection of vital statistics both local and Statewide, outside of the cities of New York, Brooklyn and Buffalo, was controlled by the terms of this statute and by the terms of chapter 322 of the Laws of 1880, which last mentioned chapter created the State Board of Health. Section 5 of chapter 270 of the Laws of 1885 was amended by chapter 309 of the Laws of 1888 in and by which amendment it was provided:

"Such copies (of registered records of births, marriages and deaths) duly attested by the local registering officer, and verified transcripts from the records preserved in the state

bureau of vital statistics, shall be admitted in all courts of this state as *prima facie* evidence of the facts therein set forth. * * *

Chapter 661 of the Laws of 1893 was entitled "An Act in relation to the public health, constituting chapter 25 of the general laws." It consisted of 210 sections subdivided into 12 articles.

By section 1 it was provided that the act itself should be known as the public health law.

By section 2 it was provided that there should continue to be a State Board of Health. In substance this act re-enacted chapter 322 of the Laws of 1880, which created the State Board of Health with added provisions and re-enacted chapter 270 of the Laws of 1885 as amended by chapter 309 of the Laws of 1888.

The supervision of vital statistics upon the part of the State Board of Health provided for in section 7 of the Laws of 1880 was further enacted in section 5 of chapter 661 of the Laws of 1893.

Article II of chapter 661 of the Laws of 1893 is practically a re-enactment of chapter 270 of the Laws of 1885 as amended by chapter 309 of the Laws of 1888, being devoted to the establishing of local boards of health and enumerating their powers and duties, and section 22 of this Article II pertaining to vital statistics corresponds to subdivision 5 of section 3 of chapter 270 of the Laws of 1885 as amended by chapter 309 of the Laws of 1888.

Chapters 322 of the Laws of 1880 which established the State board of Health, and chapter 270 of the Laws of 1885 with the amendment thereof by chapter 309 of the Laws of 1888 are repealed in their entirety by chapter 661 of the Laws of 1893, and after this act took effect the matter of registration of vital statistics by the State and the matter of registration of vital statistics the local boards of health in the cities and towns of the State other than the cities of New York, Brooklyn, Buffalo, Albany and Yonkers, were regulated by its provisions.

Chapter 29 of the Laws of 1901 was a statute entitled "An act to amend the public health law, creating a state department of health, and abolishing the state board of health."

By force of section 1 thereof the state department of health and the office of commissioner of health were created. The commissioner of health was to be head of the department. Section 2 thereof provided that wherever the term "state board of health" occurred in any statute it should be deemed to refer to the department of health created by this act and the commissioner of health was to exercise all the powers and perform all the duties con-

ferred or imposed by law upon the state board of health or any member, committee or officer thereof including the secretary. Section 5 of chapter 661 of the laws of 1893 pertaining to vital statistics was amended by this act so that the text of said section provided that the division of vital statistics should be under the general charge and supervision of the commissioner of health.

Laws of 1909, chapter 49, was entitled as follows: "An Act in relation to the public health constituting chapter forty-five of the Consolidated Laws."

It provided that the act itself should be known as the "Public Health Law" and further provided that the State Department of health and the office of commissioner of health be continued. It consisted of 351 sections and by virtue of its provisions re-enacted chapter 661 of the Laws of 1893 as amended by chapter 29 of the laws of 1901, by practically the same section numbers, containing in addition other provisions. Among the laws scheduled to be repealed by chapter 49 of the laws of 1909 were chapter 661 of the Laws of 1893 and chapter 29 of the Laws of 1901. Chapter 557 of the Laws of 1909 in turn amended section 5 of chapter 49 of the Laws of 1901, said section 5 having reference to vital statistics.

Prior to January 1, 1914, by section 4 of the Public Health Law, the general powers and duties of the commissioner of health were defined as follows:

"§ 4. General Powers and Duties of Commissioner. The commissioner of health shall take cognizance of the interests of health and life of the people of the state and all matters pertaining thereto. * * *. He shall obtain, collect and receive such information relating to mortality, disease and health as may be useful in the discharge of his duties or may contribute to the promotion of health or the security of life in the state. * * *."

Section 5 of the Public Health Law, prior to January 1, 1914, referring to the duties of the commissioner of health, provided further:

"§ 5. There shall be in the state department of health a bureau of vital statistics, for the registration of births, marriages and deaths and prevalent diseases, which shall be under the general charge and supervision of the commissioner of health. He shall prescribe and prepare the necessary methods and forms for obtaining and preserving such statistics, and to insure the prompt and faithful registration

of the same in the several municipalities and in the state bureau. He shall from time to time recommend such forms and such amendments of law as shall be deemed necessary for the thorough organization and efficiency of registration of vital statistics, throughout the state as supervised by him. The clerical duties and safe-keeping of the state bureau shall be provided for by the commissioner of health. The comptroller shall provide and furnish such stationery as the commissioner may require in the discharge of his duties. * * *." A copy of any record or registry in the office of the state department of health, duly certified by the commissioner to be a true copy thereof shall be presumptive evidence in all courts and places of the facts therein stated. * * *."

Section 22 of the Public Health Law as in force up to January 1st, 1914, read as follows:

"§ 22. Vital statistics. Every such local board of health shall supervise and make complete the registration of all births and deaths occurring within the municipality, and the cause of death and the finding of coroners' juries, in accordance with the methods and forms prescribed by the state department of health, and, after registration, promptly forward the certificates of such births and deaths to the state bureau of vital statistics on or before the fifth of each month. * * *."

A new article was added to the Public Health Law and designated Article 20 — entitled "Vital Statistics"—by chapter 619 of the Laws of 1913, and said act repealed sections 5 and 22 of the Public Health Law as said sections were then in force and likewise amended other sections of the Public Health Law. The Public Health Law to-day, including said Article 20 as added by chapter 619 of the Laws of 1913, with such amendments as have been added thereto and to the Public Health Law generally, charges the state department of health with the duty of collecting and preserving all matters pertaining to vital statistics, both statewide and locally, through its supervisory powers.

The powers of the public health council created under section 2-A of the present Public Health Law are defined in section 2-b of said act as follows:

"§ 2-b. Sanitary Code. The public health council shall have power by the affirmative vote of a majority of its members to establish and from time to time amend sanitary regulations hereinafter called the sanitary code, by without dis-

crimination against any licensed physician. The sanitary code may deal with any matters affecting the security of life or health or the preservation and improvement of public health in the State of New York, and with any matters as to which jurisdiction is hereinafter conferred upon the health council. * * *. The provisions of the sanitary code shall have the force and effect of law and any violation of any portion thereof may be declared to be a misdemeanor. * * *."

"§ 2-c. * * *. It shall, at the request of the commissioner of health, consider any matter relating to the preservation and improvement of public health, and may advise the commissioner therein; and it may from time to time submit to the commissioner any recommendations which it may deem wise."

Section 3-a of the present Public Health Law provides:

"§ 3-a. Divisions. There shall be in the state department of health the following divisions, together with such other divisions as the commissioner may from time to time determine.

* * * * *

5. Division of Vital Statistics."

Among the duties imposed upon the commissioner of health under the provisions of the present public health law are the following:

"§ 4. General powers and duties of Commissioner. The commissioner of health shall take cognizance of the interests of health and life of the people of the state, and of all matters pertaining thereto. He shall exercise general supervision over the work of all local health authorities except in the city of New York. He shall be charged with the enforcement of the public health law and the sanitary code. He shall make inquiries in respect to the causes of disease, especially epidemics, and investigate the sources of mortality and the effect of localities, employments and other conditions, upon the public health. He shall obtain, collect and preserve such information relating to mortality, disease and health as may be useful in the discharge of his duties or may contribute to the promotion of health or the security of life in the state. * * *."

“§ 371. Duties of state commissioner of health as to vital statistics. The state commissioner of health shall have general supervision of the division of vital statistics, which shall be established by the department of health and which shall be under the immediate direction of a director to be appointed by the commissioner, who shall possess such qualifications as may be prescribed by the public health council. * * *”

The registration of births and deaths is dealt with by the provisions of sections 370 to 394 of said article 20. Section 370 reads as follows:

“§ 370. Registration of births and deaths; duties of state department of health. The state department of health shall have charge of the registration of births and deaths, shall provide the necessary instructions, forms and blanks for obtaining and preserving such records, and shall procure the faithful registration of the same in each primary registration district as constituted by this article, and in the division of vital statistics at the capital of the state. The said department shall be charged with the uniform and thorough enforcement of this article throughout the state and shall from time to time recommend any additional legislation that may be necessary for the purpose. The public health council may establish such rules and regulations supplementary to the provisions of this article and not inconsistent therewith, as it may deem necessary from time to time in relation to the registration of births and deaths. Such rules and regulations shall be observed by all authorities upon whom duties are imposed by this article in connection with the registration of births and deaths.”

The division of the state into registration districts; the appointment and qualification of registrars therein; form of certificate of births and deaths and the persons charged with the duty of returning the same; and other provisions having for their aim the compilation of accurate statistics relating to births and deaths are provided for in said article 20 of the Public Health Law. By force of section 387 of the Public Health Law the commissioner of health is directed to prepare, print and supply to all registrars all blanks and forms necessary to register, record and preserve returns or otherwise to carry out the purposes of said article 20, and to prepare and issue such detailed instruc-

tions as may procure the uniform observance of the provisions of said Article 20 and secure the maintenance of a perfect system of registration.

Section 391 of the Public Health Law provides that any copy of a record of a birth or death, when properly certified by the State Commissioner of Health, shall be *prima facie* evidence in all courts and places of the facts stated therein.

Said article 20 of the Public Health Law is devoted mainly to registration of births and deaths. The record of marriages is not referred to in said article 20.

Prior to January 1, 1914, the provisions of section 5 of the Public Health Law quoted above, provided that the bureau of vital statistics referred to in said section should be a department for the registration of births, marriages and deaths.

No mention is made in the present Health Law to registration of marriages by that title. The present Public Health Law provides in section 3-a for a division of vital statistics in the health department. By section 4 the Commissioner of Health is charged with the duty of obtaining, collecting and preserving such information as may be useful in the discharge of his duties or may contribute to the promotion of health or the security of life in the State, and by section 379 of said Public Health Law the Commissioner of Health is to have general supervision of the division of vital statistics which shall be established by the department of health.

Article 3 of the Domestic Relations Law relates to the solemnization, proof and effect of marriage. Section 13 thereof requires persons intending to be married to obtain a license therefor. Section 14 prescribes the form of marriage license; section 15 recites the facts to be ascertained and recorded by the clerk before issuing the license.

Section 19 of the Domestic Relations Law requires each town or city clerk to keep a book and therein record all affidavits, statements, consents and licenses, together with the certificate attached showing the performance of the marriage ceremony. On or before the fifteenth day of each month the said town or city clerk is required to file in the office of the clerk of the county in which the city or town may be situated the original of each affidavit, statement, consent, license and certificate which have been filed or made before him during the preceding month. By force of section 20 of said law the county clerk of each county except the counties included within the city of New York is required to keep

a copy and index in a book kept in his office for that purpose each statement, affidavit, consent and license together with the certificate thereto attached showing the performance of the marriage ceremony filed in his office, and during the first twenty days of the month of January, April, July and October of each year is required to transmit to the State Department of Health at Albany, New York, all original affidavits, statements, consents and licenses with certificates attached filed in his office during the three months preceding the date of such report, together with all original contracts of marriage made and recorded in his office which record shall be kept on file and properly indexed by the State Department of Health. Section 21 of the Domestic Relations Law directs the State Department of Health to furnish blank forms for marriage licenses and certificates and also proper books for registration ruled for the items contained in said forms and also blank statements and affidavits and such other blanks as shall be necessary to comply with the provisions of said article 3 of the Domestic Relations Law.

Through the operation of the provisions of the Public Health Law and the Domestic Relations Law the State Department of Health is made the final repository of the original certificates of births, marriages and deaths. Its duty with respect to these original certificates of births, marriages and deaths, is defined generally in the provisions of the Public Health Law, whereby a division of vital statistics is established in the Department of Health, and the Commissioner of Health is directed to obtain, collect and preserve such information relating to mortality and health as may be useful in the discharge of his duties or may contribute to the promotion of health or the security of life in the State, and also in the general supervising powers over the division of vital statistics conferred upon the State Commissioner of Health.

The duty imposed upon the State Department of Health with respect to registration of births and deaths is specifically outlined in the provisions of article 20 of the Public Health Law, and the similar duty to provide books and forms and blanks for the recording of marriage certificates and properly file, record and index the same is enjoined upon the State Department of Health by the provisions of sections 20 and 21 of the Domestic Relations Law.

The provision contained in section 7 of chapter 322 of the Laws of 1880, which statute first created a State Board of Health, directing the establishment of a central bureau for the registration of vital statistics at the capital of the State and defining as a

duty of the State Board of Health the supervision of the State system of the registration of marriages, births and deaths and the registration of prevalent diseases, is substantially incorporated in the present Public Health Law. The provisions of the laws hereinbefore quoted up to the enactment of the Public Health Law with its amendments to date, that related to matters contained in said chapter 322 of the Laws of 1880, though in terms repealing preceding statutes, were, as far as the subject matter of the legislation contained therein, a substantial re-enactment of provisions of prior laws, and such provisions of the present Public Health Law that are, in effect, substantial re-enactments of portions of prior statutes, are to be construed as a continuation of the provisions of such prior laws and not as new enactments. (Section 95, General Construction Law; Matter of Prime, 136 N. Y. 347.) And in this respect there are other provisions of the present Public Health Law which are substantial re-enactments of some of the provisions contained in chapter 322 of the Laws of 1880 and acts passed subsequent to and amendatory to said chapter. The Commissioner of Health is by section 10 of the present Public Health Law charged with the performance of all the duties imposed by law upon the State Board of Health, or any member, committee or officer thereof, including the secretary, and this section further provides that wherever the term "board of health" occurs or any reference is made thereto, in any law, it shall be deemed to mean or refer to the present State Health Department.

Section 391 of the present Public Health Law reads in part as follows:

"§ 391. Certified copies of records. State commissioners of health to furnish. The State Commissioner of Health may, upon request, supply to any applicant, a certified copy of any birth or death registered under the provisions of this act * * *."

The act referred to is the present Public Health Law which is in itself a continuation of the State Department of Health and the officer or commissioner of health as constituted by prior statutes (section 2) and also a continuation of all statutes referring to the State Board of Health which was the immediate predecessor of the present State Department of Health not repealed expressly or by implication (section 15). Interpreting the provisions of section 391 quoted above, together with all other sections of the present Public Health Law, the record of births and deaths men-

tioned therein, refers to all such records under the dominion and control of the present State Department of Health or the commissioner of health as record items of vital statistics filed and recorded therein since the enactment of the statute first constituting the State Board of Health, wherein provision was made for the establishing at the capital of the State of a central bureau of vital statistics, down to the present time.

The records of marriages, births and deaths, filed and recorded with the State Department of Health, or its predecessor, the State Board of Health, are public records and section 66 of the Public Officers Law is properly applicable to such records. Said section 66 of the Public Officers Law provides :

“Section 66. Persons having custody of papers in public offices to search files and make transcripts. A person having the custody of the records or other papers in a public office, within the State, must, upon request, and upon payment of, or offer to pay, the fees allowed by law, or, if no fees are expressly allowed by law, fees at the rate allowed to a county clerk for a similar service, diligently search the files, papers, records and dockets in his office ; and either make one or more transcripts therefrom, and certify to the correctness thereof, and to the search, or to certify that a document or paper, of which the custody legally belongs to him, can not be found.”

The duties imposed by the section last quoted include, within their scope, searching, transcribing or certifying with respect to all the records on file under the dominion and control of the official having the legal custody of such papers as may have been filed and recorded pursuant to law, and by force of this section 66 of the Public Officers Law, the head of the State Department of Health or a person to whom the duty could be lawfully delegated, is charged with the duty of making and certifying a transcript, and searching upon the request of a person lawfully entitled to such transcript or certificate as to the result of a search with respect to the files and records in their entirety now in the custody, and under the dominion and control of the State Department of Health, as items of vital statistics.

Though the power and authority to certify as to records of births and deaths conferred upon the Commissioner of Health by section 391 of the Public Health Law is so conferred by force of the words “the state commissioner of health may, upon request supply to any applicant a certified copy of the record of any birth

or death, etc.," the exercise of such power and authority concerns a matter of public interest and in certain instances affects the rights of individuals, and the permissive words of this section are to be deemed mandatory and "may" shall be construed to mean "must" where the request for such a certification is made by a person lawfully entitled to such a certification (*People ex rel. Reynolds v. Common Council of the City of Buffalo*, 140 N. Y. 300; *Matter of Lauterjung*, 48 Sup. Ct. 308). Section 66 of the Public Officers Law quoted above would also serve by the operation of its provisions to render the power and authority conferred upon the State Commissioner of Health by section 391 of the Public Health Law a mandatory duty and not simply permissive or discretionary.

The legislature has imposed upon the public health council and the Commissioner of Health the duty of securing an efficient administration of so much of the Public Health Law as relates to the registration of births and deaths as provided for in article 20 of the Public Health Law, and has conferred upon the public health council and the Commissioner of Health power and authority in matters pertaining to the enforcement of the provisions of said article 20 of the Public Health Law conducive to a proper discharge of the duty so imposed.

Section 370 of the Public Health Law in part provides:

"The public health council may establish such rules and regulations supplementary to the provisions of this article (article 20) and not inconsistent therewith, as it may deem necessary from time to time in relation to the registration of births and deaths. Such rules and regulations shall be observed by all authorities upon whom duties are imposed by this article in connection with the registration of births and deaths."

All registrars are persons upon whom duties are imposed by article 20 of the Public Health Law.

Section 393 of the Public Health Law specifically charges each registrar with a strict enforcement of the provisions of said article 20 under the supervision and direction of the State Commissioner of Health, and in addition provides: "The State Commissioner of Health is hereby charged with the thorough and efficient execution of the provision of this article (article 20) in every part of the State, and is hereby granted supervisory powers over registrars, deputy registrars and sub-registrars, to the end that all of its requirements shall be uniformly complied with."

The source of the general authority conferred upon the public health council is found in section 2-b of the Public Health Law wherein it is provided:

"The public health council shall have power by the affirmative vote of a majority of its members to establish and from time to time amend sanitary regulations, hereinafter called the sanitary code * * *. The sanitary code may deal with any matters affecting the security of life or health or the preservation and improvement of public health in the State of New York, and with any matters as to which jurisdiction is hereinafter conferred upon the public health council * * *."

The Public Health Law in its entirety is legislation affecting the security of life and health and the preservation and improvement of public health within the State of New York, and under the general authority granted to the public health council to provide regulations that may deal with any matter affecting the security of life or health or the preservation and improvement of public health within the State of New York, there was included within the scope of such authority the right to adopt regulations relating to the matter of vital statistics and the division of vital statistics, established and maintained by the express mandate of the Public Health Law.

The regulations of the public health council necessarily could not conflict with any positive law or operate to defeat, restrict or limit a right established by the express enactment of the legislature.

In discussing the power and authority of the State Department of Health or its officials or the public health council to regulate the manner in which the records filed and recorded as vital statistics should be inspected or certified transcripts thereof issued, it is pertinent to point out that the matters of such record do not constitute a minute or record of the acts or proceedings of a public official, body or commission, or a public office. They are entirely the record of matters personal to the citizen or citizens who is or are described in the information filed as a record item of vital statistics.

In the absence of any statute whatsoever relating to the matters of record in the State Department of Health, the officials having charge of the administration of said department might in the exercise of a wise discretion either withhold or permit the inspec-

tion or disclosure of any of the records of their department, depending upon whether they can be convinced that such inspection or disclosure is for a legitimate purpose or not. (*American District Telegraph Co. v. Woodbury*, 127 A. D. 455.)

The provisions of section 66 of the Public Officers Law relating to searching of records of a public office and certifying transcripts of such records, and section 391 of the Public Health Law relating to certified copies of births and deaths impose a duty on the department of health to issue such certified copies or search the records of said department.

In construing these sections, however, it must be assumed that they were enacted with knowledge on the part of the legislature of the existence and scope of the old laws or other laws in force, and that there was no intention to repeal the old laws in enacting the new law unless express words to that effect were used or unless the new law, after every reasonable construction is in terms so repugnant to the old law that both cannot be given effect. (*Davis v. Supreme Lodge*, 165 N. Y. 159.)

There is nothing in section 66 of the Public Officers Law nor in section 391 of the Public Health Law, which is repugnant to or that would operate to repeal the provisions of the public health law relating to power and authority of public health council to enact rules and regulations relating to the records of its office compiled as records of vital statistics generally, and its specific authority to establish rules and regulations in relation to the registration of births and deaths.

The right to the inspection of public documents was discussed in the case of *Matter of Eagen*, 205 N. Y. 147. In that particular case the public records concerned were the minutes of the proceedings of municipal board relating to a matter in the line of its official duties, and the right of inspection was claimed pursuant to the provisions of section 51 of the General Municipal Law. In both of these particulars the records of the department of health, filed and recorded in the division of vital statistics, differ from records mentioned in the case last cited as section 51 of the General Municipal Law does not apply to the State Department of Health, nor are the records in the division of vital statistics records of the proceedings or acts of any public official, board or office. The right to the inspection upheld in the case of *Matter of Eagan*, 205 N. Y. 147, was upheld upon the ground that the party seeking such inspection disclosed in his application for such an inspection that the inspection was sought for a legitimate purpose; the mov-

ing papers showing the applicant to be a taxpayer and a person who came within the provisions of section 51 of the General Municipal Law, and the legislature having by statute made provision for the maintenance of an action by a taxpayer to prevent waste of or injury to the property of a municipal corporation, and this status of the taxpayer gave him a legitimate interest in respect to the contents of any public document that would be serviceable to him in the prosecution of such a suit as the law would authorize the taxpayer to bring.

The right to certification of any of the records in the division of vital statistics in the State Department of Health or a certificate as to the result of a search thereof under section 66 of the Public Officers Law, is to be determined with due regard to the particular rights of each applicant who may make application for such certification or search. Said section does not confer the right to demand a transcript or certify as to the result of a search upon the part of an applicant who cannot specify a right or remedy or a legitimate purpose to be served thereby. (*Matter of Lord*, 167 N. Y. 398.)

With respect to the information contained in certificates of death filed in the Bureau of Vital Statistics relating to causes of death, considerations of public policy and the provisions of section 834 of the Code of Civil Procedure forbid the indiscriminate disclosure of so much of said information as might have been obtained through the confidential relations of physician and patient. (*Davis v. Supreme Lodge* 165 N. Y. 159.)

In the *Matter of Allen*, 148 A. D. 26, an application was made to examine certain records of the department of health in the city of New York, the applicant basing his right to such inspection squarely on his right as a taxpayer under a publicity statute quoted in the opinion. The court in its opinion deciding the merits of the application discussed the construction of the so-called publicity statutes in general, aside from the special statutes interpreted in the case, as follows:

“Publicity statutes similar to the one relied upon by the respondent are common in this country, and they are usually couched in broad terms, but it is generally held that even under such statutes, the individual seeking an inspection must show that the information is sought for some legitimate and specific purpose, and that the gratification of mere curiosity or some speculative purpose will not suffice. What

will be deemed a sufficient reason for the examination of any specified records must depend in each case upon its own peculiar circumstances. The department of health, whose records relator seeks to examine, differ in many respects from other municipal departments. In consequence of the nature of its duties it becomes the repository of the records concerning the most intimate affairs of the individuals resident within the limits of the municipality, and among these records are doubtless to be found many matters of no public interest, but which might, if disclosed to whomsoever sought to examine them, be used for sinister or unworthy motives.

The application to so inspect the records discussed in the preceding case was denied and the decision of the Appellate Division denying said inspection was affirmed by the Court of Appeals. (*Matter of Allen*, 205 N. Y. 158.) The affirmance was in accordance with a construction of a special statute affecting New York City Board of Health.

Under the provisions of the Public Health Law the public health council has authority to adopt rules and regulations defining under what circumstances the records of the division of vital statistics in the department of health may be inspected, and transcripts from such records or searches thereof shall be made, where such rules and regulations have for their aim that the purposes of the law in establishing a division of Vital Statistics shall be fully subserved but not subverted, and in particular have the authority to provide that no inspection, transcript or search of its record shall be made without facts being disclosed to indicate that the application for such inspection, transcript or search is for a legitimate purpose.

Section 370 of the Public Health Law, by its express terms renders it obligatory upon the part of all local registers to conform any and all regulations which the public health council might adopt in connection with the registration of births and deaths, and such regulations as the public health council might adopt relative to the inspection or certification of transcripts from or searching of the records of births and deaths would include such records in the offices of local registrars.

The records of marriages in the offices of the several town, city and county clerks are filed and recorded therein pursuant to provisions of the Domestic Relations Law.

Section 19 of the Domestic Relations Law, specifically provides that the book containing the record of the affidavits, statements, consents, license and certificate showing the performance of the marriage ceremony, kept as required by the provisions of this section by the city or town clerk shall be preserved as part of the public records of his office and open to public inspection. He is further authorized to make a search of such records and certify as to the result of the same upon the payment of a specified fee therefor.

Section 51 of the General Municipal Law is applicable to the records relating to marriages in the offices of city, town and county clerks and reads as follows:

“Sec. 51. All books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation of this state are hereby declared to be public and shall be open, subject to reasonable regulations, to be prescribed by the officer having custody thereof, to the inspection of any taxpayer.”

The records relating to marriages collected and preserved in the offices of city and town clerks are, by express provision of Section 19 of the Domestic Relations Law, to be open to public inspection and through the operation of Section 51 of the General Municipal Law all the records of city, town and county clerks are, subject to reasonable regulations, open to the inspection of any taxpayer, which inspection so provided for would necessarily include the marriage records in the several offices of city, town or county clerks.

The clerks of the several towns, cities and counties of the State are in no sense subordinates of the State Department of Health other than in such instances where a city or town clerk may perform the duties of a registrar under article 20 of the Public Health Law.

The right of public inspection granted under section 51 of the General Municipal Law of records in the offices of city, town or county clerks is limited only by such reasonable regulations as the head of either of these several offices may prescribe. No regulation could be deemed authorized which would serve to defeat the purpose of the statute in permitting public inspection of the records, lawfully filed and recorded in the office of the city, town or county

clerks. On the other hand it is to be assumed that the legislature enacted section 51 of the General Municipal Law and section 19 of the Domestic Relations Law with the knowledge of the decisions of the courts construing similar publicity statutes in general, unless it expressly appears in said statutes that the construction given by the courts as to effect of similar statutes was not intended. (*Pouch v. Prudential Ins. Co.*, 204 N. Y. 281.) There is no language in either section 19 of the Domestic Relations Law or section 51 of the General Municipal Law that would indicate that the legislature intended that said sections were to be interpreted in a manner different from the construction given by the courts theretofore to statutes couched in similar language and enacted to serve a similar general purpose. The quoted portion of the opinion of the court in *Matter of Allen*, 148 A. D. 26, hereinbefore set forth, would apply to the records relating to marriages filed by law in the offices of the city, town or county clerks. The Legislature intended that the inspection provided for in section 51 of the General Municipal Law should be subject to reasonable regulation; otherwise the power to describe reasonable regulations respecting the inspection of public records would not have been conferred upon the officer having the custody of such records, as it was so conferred by the express provision of section 51 of the General Municipal Law.

In view of the decisions of the courts construing publicity statutes in general section 19 of the Domestic Relations Law and the language of section 51 of the General Municipal Law, granting authority to the officer having the custody of the records to prescribe reasonable regulations with respect to the inspection of such records, the city, town or county clerk, may make regulations with respect to the issuing transcripts from or the inspection of the records in their respective offices relating to marriages as may insure that such transcripts be issued or inspection made for a legitimate purpose, and not merely for the gratification of curiosity or for speculative purposes.

Section 391 of the Public Health Law provides for the payment of a fee of one dollar to the State Commissioner of Health for a certified copy of the record of any birth or death. For any search of the files and records, when no certified copy is made, the State Commissioner of Health is entitled to the sum of fifty cents an hour or fractional part of an hour spent in such search. The files and records referred to in this section include all files and

records under the dominion and control of the State Department of Health as constituting the items of vital statistics, under the supervision of the State Department of Health or the Commissioner of Health filed or recorded since the time of the creation of the central bureau of vital statistics under the first statute creating the State board of health in 1880.

There is no express statute determining the fees payable to the State Commissioner of Health for certification of or search of the files and records of the Department of Health relating to marriages.

Section 66 of the Public Officers Law provides that a person having the custody of papers in a public office shall be paid the fees allowed by law for a transcript therefrom or a search thereof and if no fees are allowed by law, such a person may receive and collect the same fees as a county clerk might lawfully charge for a similar service.

Section 3304 of the Code of Civil Procedure in prescribing the amount of fees of the county clerks generally, among other provisions, contains the following:

“For a copy of an order, record or other paper, entered or filed in his office, eight cents for each folio.”

“For searching and certifying the title to and incumbrances upon real property, for each year for which the search is made, for each name, and each kind of conveyance or lien five cents.”

Section 3305-a of the Code of Civil Procedure, referring to the fees of the county clerk, provides that the minimum total charge for certification or exemplification in all cases shall be twenty-five cents.

The certification of a record of a marriage would entitle the State Commissioner of Health to a minimum fee of twenty-five cents therefor, with the right to charge at the rate of eight cents per folio for such certified copy of the record of a marriage filed or recorded with the State Department of Health.

For a search of the records of the Department of Health the Commissioner of Health would be entitled to charge at the rate of five cents a year for each name searched against, that being the fee allowed to county clerks in searching the title to real property, and this searching the title to real property being a service similar to searching for a marriage record, both consisting of an inquiry against persons by name.

The records relating to marriages for which this charge could be made, includes all the records of marriages that are a component part of the vital statistics in the State Department of Health filed or recorded therein since 1880.

Dated October 6th, 1921.

CHARLES D. NEWTON,
Attorney-General.

By THOS. F. FENNELL,
First Deputy.

To Dr. HERMAN M. BIGGS, *State Commissioner of Health,*
Albany, N. Y.

COURT AND TRUST FUNDS — INVESTMENT OF FUNDS DEPOSITED WITH COUNTY TREASURER — LOSS THROUGH DEPRECIATION IN MARKET VALUE OF LIBERTY BONDS — TRANSFER OF SECURITIES — EFFECT OF SECTION 249 OF COUNTY LAW.

Where the market value of liberty bonds in which funds deposited with a county treasurer have been invested pursuant to the authority conferred by chapter 132 of the Laws of 1918 has depreciated, the securities should not be transferred to another account so that payment in full might be made to the persons for whose benefit the fund was deposited, on any other basis than that of their present market value.

Where an application is made for the withdrawal of the fund the attention of the court should be drawn to the nature of the investments made, so that an opportunity may be afforded to turn over the securities in kind or proper direction made for their disposal.

The county treasurer is not personally liable for the temporary loss arising out of a depreciation in the market value of liberty bonds, in which he has invested court and trust funds, and it seems that section 249 of the County Law does not impose a liability upon the county for such loss.

FACTS

Chapter 132 of the Laws of 1918 amended subdivision 8 of section 4 of the State Finance Law relating to the investment of trust funds by county treasurers by providing as follows:

“In the absence of any direction for the investment of moneys received by such treasurer for other than a public use, such moneys may be invested in registered bonds of the United States of America bearing interest at a rate of not less than four per centum per annum, but the whole amount of money so invested in such bonds shall not, at any time, exceed fifty per centum of all moneys held by such treasurer which were not received for some public use.”

Acting under the authority of this statute county treasurers have invested moneys paid into court in the purchase of liberty

bonds at par within the prescribed limits, crediting the interest received to the particular action or proceeding out of which the funds arose. Since making such investments the market value of the securities has depreciated and it is apprehended that the county treasurers will have difficulty in complying with orders which may be granted directing the payment of funds out of court upon applications made on behalf of the individuals for whose benefit the funds were received.

INQUIRIES

In connection with such matters inquiries are made (1) as to whether payment should be made to the parties interested on the basis of the valuation of the initial investments and (2) whether funds received in another action or proceeding could be used so as to permit the payment in full to the applicant and the securities transferred to the credit of such other action or proceeding in substitution of the funds so withdrawn, and, if so, who should direct and be responsible for such transfer.

Attention is called to the provisions of section 249 of the County Law which it is intimated might bear upon the question of responsibility for any loss by reason of the investment. Said section reads as follows:

“Each county of the state shall be responsible for all funds or moneys deposited with the treasurer thereof by virtue of a judgment, decree or order of any court of record in this state, and an action to recover any loss to or of such fund may be brought against the county by any party aggrieved or by the comptroller of the state of New York in a court of competent jurisdiction.”

OPINION

The provisions of section 249 of the County Law were originally enacted as chapter 186 of the Laws of 1908, and, so far as I can find, have not as yet received judicial interpretation. Prior to their enactment there was no question that the county was not liable for loss resulting from investment of trust funds deposited with its treasurer. (*Gray v. Supervisors of Tompkins County*, 26 Hun, 265.) The remedy of the injured party was to proceed against the treasurer personally or his sureties. It will be noted, however, that there was and is a distinction between the liability of the depository arising out of the loss of

funds and that caused by a depreciation in the value of securities held or investments made. In the case of loss of uninvested funds the courts have consistently held that the liability of the depositary was almost akin to that of an insurer and he was bound to make reimbursement even where such loss occurred through no fault or negligence on his part, such as through theft or by the failure of a bank. (*Tillinghast v. Merrill*, 151 N. Y. 135; *City of Johnstown v. Rodgers*, 20 Misc. 262; *Village of Bath v. McBride*, 219 N. Y. 92.) With respect to loss through investment of money paid into court the same reasons for the application of such a rule do not prevail and the rule has, in fact, been different. Where funds have been invested pursuant to an order or judgment or under a general court rule, the responsibility of the county treasurer has been that of a trustee (*Chesterman v. Eyland*, 81 N. Y. 398; *Tompkins County v. Ingersoll*, 81 App. Div. 334, 348; *affd.* 177 N. Y. 543), and the test of his liability was whether he had exercised due care and prudence. If he had done so he was not liable for losses not occurring through his fault or negligence. (*Chesterman v. Eyland*, *supra*; *Waydell v. Hutchinson*, 146 App. Div. 448.) It may well be argued that the Legislature by the enactment of the provisions contained in section 249 of the County Law did not intend to impose any greater liability upon counties than that which existed on the part of its officials and their sureties. However, in view of the conclusions hereinafter set forth, it has not been deemed necessary to pass upon that question at this time.

Section 136 of the Civil Practice Act (formerly Code, section 747) provides that the court may direct that money paid into court be "invested or reinvested in any manner or form that appears to it best for the interest of the owners thereof." Such directions must be embodied in an order or decree of the court founded upon proper and sufficient evidence satisfactory to the court that such disposition of the property is best for the interests of the owners thereof or parties interested therein. Section 1063 provides that the court may direct the share of an infant arising out of a partition action to be invested in permanent securities and by section 1064 the share of an absentee or unknown defendant must be invested in permanent securities at interest for his benefit. In my opinion the authority given to county treasurers by the provisions of section 132 of the Laws of 1918 is equivalent to a direction of the court.

It will be noted that there is a distinction between a deposit and a payment invested by order of the court. (*DePeyster v.*

Clarkson, 2 Wend. 77, 107.) When an investment has been legally made the security stands in place of the money used in its purchase and is held for the benefit of the *cestui que trust*, who is credited with any income therefrom. The security is part of his "estate," but in the nature of things it can hardly be said that it is part of any "funds" or "moneys" deposited for his benefit. The character of that to which he is or will become entitled has been changed. Assuming that the language of section 249 that each county shall be "responsible" for all funds or moneys deposited with the treasurer, pursuant to a direction of the court, means that it shall be "absolutely liable," I would hesitate to hold that such strict liability extends beyond the literal terms of the statute. The temporary loss in the market value of liberty bonds legally purchased is not a loss of the "fund," but that which has in part taken the place of the fund and the county should not be mulcted therefor, unless the authority to do so is to be found in terms which cannot be questioned.

Where investments of court and trust funds are made in securities whose market value is less than their par value the expenditure for the investment should be made on the basis of market value. The provisions of section 44-d and section 44-f of the State Finance Law indicate that each account for moneys and securities deposited in court to the credit of particular actions or proceedings should be kept separately. Therefore, moneys deposited for the benefit of a particular person or persons should not be used in taking up securities purchased by funds originally placed to the credit of some other persons, except upon the basis of the market value of the securities at the time of transfer.

Moneys paid into court can only be withdrawn upon an order of the court. (*Civil Practice Act*, section 137.) Every application for such an order must be accompanied by a certificate of the city chamberlain or county treasurer showing the present amount and condition of the fund. (*Rule 32, Rules of Civil Practice; Matter of Barry*, 138 App. Div. 899; *Hulbert v. McKay*, 8 Paige, 651, 654.) It is to be presumed that where the market value of securities has depreciated the certificate of the depository will show that fact. Where notice of application for an order directing the withdrawal of the fund is given, attention should be drawn to the nature of the investments so that an opportunity may be afforded to turn over the securities in kind or proper directions made for their disposal. Where, without notice to the depository, an order is made directing the payment

out of a specified sum larger than the amount of cash on hand plus the value of the securities credited to the particular action or proceeding, steps should be taken to have the order amended. It would seem that where a temporary loss has occurred through the depreciation of the market value of securities held for the benefit of more than one person, such loss should be apportioned among all the claimants. (*Elkin v. Elkin*, 29 Misc. 513.) The question of apportionment, however, is one which should properly be left for the determination of the court, when an application for payment out of court is made in any particular case.

Dated November 4, 1921.

CHARLES D. NEWTON,
Attorney-General.

To HON. JAMES A. WENDELL, *Comptroller of the State of New York.*

CONSERVATION LAW — NON-RESIDENT FISHING LICENSES — BONA FIDE
RESIDENT — DEFINITION.

"A *bona fide* resident of this state," within the meaning of section 188 of the Conservation Law, means a person domiciled in the State of New York.

INQUIRY

Section one hundred and eighty-eight of the Conservation Law provides:

"§ 188. NONRESIDENT FISHING LICENSE. No person, except a *bona fide* resident of this state for at least thirty days immediately prior to such taking, shall take any fish by angling in any of the fresh waters under the jurisdiction of the state of New York or shall engage in fishing in such waters without first having procured a license so to do. Said license shall be procured in the manner provided in section one hundred and eighty-five hereof. The applicant shall pay to the clerk the sum of two dollars as a license fee therefor, together with the sum of fifty cents as a fee to the clerk; provided, however, that a non-resident person under the age of sixteen years may take fish, by angling, without obtaining a fishing license. The provisions of section one hundred and eighty-five in so far as the same are applicable to licenses shall apply to all licenses issued under this section; provided, however, that if a resident of this state may lawfully take fish

in such part of the international boundary waters bordering upon the State of New York as are not within the jurisdiction of the said State without being required to obtain a fishing license from the country having jurisdiction over the said waters, then a resident of said country may take fish in such part of said international boundary waters as are within the jurisdiction of the State of New York without obtaining the non-resident fishing license provided for herein."

Is a person, domiciled in a foreign state or nation, but who owns a summer residence in this State and occupies the same for two or three months each year for vacation purposes, "a bona fide resident of this State" within the meaning of those words as used in the section above quoted?

OPINION

An opinion is sought in behalf of "hundreds of owners of summer homes at the islands (meaning the islands in the St. Lawrence River on the New York side thereof) who live in these homes for several months each summer with their families, yet *whose voting residence is outside the State.*" Counsel for these summer residents, domiciled outside the State, has asked the Conservation Commission to make a ruling that these persons, by virtue of their ownership of summer homes on the islands and their annual occupation thereof during a portion of the summer season each year, are, with the members of their respective families, entitled to fish in any of the waters of the State without taking out the non-resident license prescribed by section 188; and the Conservation Commissioner has asked whether this may lawfully be done.

Bona fide residents of this State may fish without a license; all others must take out a license and pay therefor the trifling sum of \$2.50. As the word "resident," as used in this statute might possibly mean a temporary resident whose legal residence or domicile was outside the State, although, in statutes, it generally means a person domiciled here, the question involves the legislative intent in using the words "a *bona fide* resident of the State."

In my opinion the word "resident" as used in section 188 of the Conservation Law, means a person domiciled here.

In *People v. Platt*, 117 N. Y. 159, by chapter 358 of the Laws of 1863, the Governor was required to appoint three Commissioners of Quarantine who should be citizens of this State, and *residents* of the Metropolitan Police District. The Governor appointed Thomas C. Platt to be one of such Commissioners. He

qualified and entered upon his duties. Afterwards, an action was commenced to cause his removal from office upon the sole ground that he was not a resident of the Metropolitan Police District. The jury found that Mr. Platt "did not have a legal residence and domicile at the time in question in the Metropolitan Police District." Defendant contended that he actually resided in New York city which was within the Metropolitan Police District, and that such residence was sufficient, although, as admitted by him, his domicile was in Tioga county, where he exercised all the legal rights growing out of such domicile. Judge Danforth, writing for the court, declared the only question was as to "*the true construction of the statute.*" (P. 163.) After holding that the evidence justified the verdict, and without questioning the fact that, for business purposes, Mr. Platt did reside in New York city, living with his wife at the Fifth Avenue Hotel, Judge Danforth laid down the general rule that "in *all cases* where a statute prescribes 'residence' as a qualification for the enjoyment of a privilege or the exercise of a franchise, *the word is equivalent to the place of domicile of the person who claims its benefit.*" (P. 167.)

Under the statute now being construed, a *bona fide* resident of the State may claim the privilege of fishing without a license; and, applying the rule above stated, he must show that his domicile is in the State of New York.

In *de Meli v. de Meli*, 120 N. Y. 485, plaintiff brought her action for a separation from her husband, the defendant. To bring the case within subdivision 1 of section 1762 of the Code, she alleged that both parties were "residents" of the State of New York where the action was commenced. The trial court found that both parties, although married in Dresden, and living abroad several years thereafter, were, nevertheless, residents of the State of New York. The court held that, "within the meaning of the statute providing for actions of this character, the place of which the parties are residents is *that of their permanent abode*, which may be distinguished from their place of temporary residence." The learned judge then added:

"In legal phraseology *residence* is *synonymous with inhabitancy or domicile.*" (The italics are ours.)

Later on he said further:

"The purposes for which residence is not determined by domicile are those within the contemplation of some statutes. Such application has been made of statutes providing for levy

of attachments on the property of non-residents, and the assessment of taxes "on the personal property of residents. Then, and for the purpose of such remedy and taxation, the place where the party actually resides may (as has been held) be treated as that of his residence, although his domicile is elsewhere. Here there was some evidence that the defendant's domicile remained in this State, and, consequently, the conclusion that he was a resident of it when the action was commenced, is not reviewable on this appeal."

Matter of Dimock, 4 A. D. 501, is in point. In 1895 Dimock applied to the County Court of Ulster county for an order discharging him from his debts, pursuant to the provisions of title I of chapter XVII of the Code of Civil Procedure. By section 2149 it was provided:

"An insolvent debtor, who is a resident of the state at the time of presenting his petition, may be discharged from his debts, as prescribed in this article."

The residence of the debtor within the State was a jurisdictional fact which had to appear in the petition. (§ 2150,) Dimock alleged that he was a resident of Ulster county; but the evidence, as found by the court, established that he was a resident of the State of New Jersey. He and four associates owned a club house in the Catskills in Ulster county, where he spent large portions of his time during the summer months; but his domicile or legal residence was in Elizabeth, N. J. Prior to his petition, and for a period of about three months, he had been continuously living at his club house in the mountains; but the court said that the statute, granting the privilege to a resident debtor of applying for a discharge, must be construed to limit the privilege to persons domiciled in the State of New York and did not include persons residing here temporarily for health or pleasure.

This case illustrates the rule laid down by Judge Danforth in *People v. Platt*, *supra*, and seems to be conclusive, as to the rule of construction to be applied to the statute regulating non-resident fishing in State waters.

The remarks of Judge Vann, quoted by the distinguished jurist at whose suggestion this opinion is asked, were part of his learned opinion in the *Newcomb* case (192 N. Y. 338). That was a proceeding to procure the revocation of ancillary letters testamentary issued upon the will of Josephine L. Newcomb, executed and

probated in the State of Louisiana. Such letters could only issue upon a will of personal property made by a person "who *resided* without the State at the time of the execution thereof." (Code, section 2629.) It was conceded on all sides that the word "*resided*" as used in said section meant "*domiciled*;" and the only question was whether the testatrix, who had been formerly domiciled in this State, had effected a change of legal residence to the State where her will was executed and probated. It was held that she had changed her residence, and the order dismissing the application was affirmed by the Court of Appeals.

In discussing the evidence Judge Vann pointed out the technical distinction sometimes required to be observed between the words "*residence*" and "*domicile*." There was nothing new in the definitions given by Judge Vann in the paragraph quoted in the letter addressed to the Conservation Commission. This distinction, drawn in varying phrases is as old as the common law. As already stated, there was no question as to the meaning of the word "*resided*" as used in the Code provision; but simply whether testatrix had acquired a *new* domicile in a foreign state when she made her will. But in the paragraph quoted Judge Vann starts out by saying that,

"As *domicile* and *residence* are usually in the same place, they are *frequently used, even in our statutes, as if they had the same meaning.*"

That is, the Legislature frequently uses the word "*resident*" where the reference is to a person domiciled in the State. And where, as here, a statute grants to a "*resident*" a privilege (fishing without a license) not granted to non-residents, the word "*resident*" *must be construed to mean a person domiciled in this State.*

While all the cases above referred to are in harmony with this view, there are other considerations connected with the form and history of the section under review, leading to the same result; and the consequences of adopting the contrary construction cannot be overlooked.

Without a nonresident license to fish, a person cannot drop a line into the water until he has been a "*bona fide* resident of this State for thirty days." Why use the words "*bona fide*?" Would one of these nonresident owners of summer cottages located on an island in the St. Lawrence pretend that he had come into the State of New York with intent to become a resident thereof for

any other purpose than the fish without a license? In *Paddock v. Lewis*, 59 A. D. 430, at page 434, Judge Adams, writing for the Fourth Department, in speaking of residence as determining liability to assessment for personal property taxes, said that, for purposes of assessment, a man's residence will be deemed to continue

“until a *bona fide* change is affirmatively and satisfactorily shown to have taken place;”

and in *Lyon v. Lyon*, 13 Pa. Dist. Rep. 634, it is said that “*bona fide* residence means residence *with domiciliary intent*.” But if these people are “residents,” when does their residence for fishing purposes begin? Does it begin the moment they cross over from Vermont or Canada or New Jersey and enter their summer homes? Not unless they have already been residents *in good faith for thirty days*. Must they acquire a new residence each year? If so, they must spend half of a two months' vacation acquiring a *bona fide* residence in order that they may spend the other half fishing without a license. Again, a person may become “a resident of this State in good faith” without owning a foot of land on one of the Thousand Islands or elsewhere. Suppose a resident of Canada should come over the line and rent a cottage or a camp site and pitch a tent on the banks of the St. Lawrence or on any of the inland waters of the State, and openly declare his purpose to become “a *bona fide* resident.” Even so, he must sit idly by and watch others fish, for thirty days, before his new and *bona fide* residence will avail to dispense with the necessity of taking out a license. If he is poor, and his vacation short, it may end before he can begin to fish. Certainly, the ownership of real property is not a condition precedent to the successful initiation of a *bona fide* residence in this or any other state.

It cannot be presumed, therefore, that the Legislature intended that the words “a *bona fide* resident” should include a summer resident, whose permanent domicile and regular business establishment were outside the State; but rather a person who had come into the State with intent to establish his domicile here and had manifested such intent by a residence of at least thirty days.

By chapter 223 of the Laws of 1915, section 188 was added to the Conservation Law. By its provisions no person who had not been “a *bona fide* resident of this State for at least thirty days” could take any fish by angling in any of the waters of the Niagara river under the jurisdiction of the State of New York nor engage in fishing therein without first having procured a license so to do.

By chapter 522 of the Laws of 1916, said section was amended so as to prohibit nonresidents from fishing on the New York side of *any waters which constitute part of the State boundary* without first taking out a license so to do. It was further provided, however, that if residents of this State might lawfully fish without a license on the foreign side of such boundary waters, then the *residents* of such foreign state or nation might fish without a license on the New York side thereof. The manifest purpose of this statute was to enforce reciprocity, and was confined to boundary waters.

In 1918, by chapter 52, the Legislature further amended section 188 of the Conservation Law. Under the section as it now stands, nonresidents may not lawfully fish *anywhere* in this State without a license; but the section contains the *proviso* quoted on the first page of this opinion.

It will be noticed that the reciprocity provision is now confined to *international* boundary waters, and, therefore, applies to residents of Canada only. The foregoing statement shows the evolution of the statute. The original purpose evidently was to prevent residents of Canada from rowing their boats across the thread of the Niagara river and fishing on the New York side of the stream. It did not contemplate an entry by residents of Canada on any of our lands, as summer residents or otherwise. The statute was aimed against Canadian fishermen — persons confessedly domiciled in Canada, and who made no pretense of residence in the State of New York. This being so, it follows that the original distinction in the legislative mind was between persons domiciled here and those domiciled in Canada. Only those domiciled here could, under the statute, lawfully fish on the New York side of the river.

In my opinion, therefore, the words “a *bona fide* resident of this State” should be construed to mean a person whose legal residence or domicile is in the State of New York.

Dated, December 6, 1921.

CHARLES D. NEWTON,
Attorney-General.

By A. F. JENKS,
Deputy.

HON. ELLIS J. STALEY, *Conservation Commissioner.*

Informal Letter
OPINIONS

[227]

INFORMAL LETTER OPINIONS

STATE BOXING LAW, SECTION 25 — PROCEEDS OF EXHIBITIONS TO BE DEVOTED TO PRAISEWORTHY CAUSE — STATE TAX — WAIVER.

The State may not waive its tax upon the proceeds from a boxing exhibition, even though such moneys are to be devoted to a praiseworthy cause, such as the rehabilitation of devastated areas in France.

It appears that on the 14th of January, 1921, a boxing exhibition is to be given in the Madison Square Garden, under the auspices of Miss Anne Morgan, the proceeds of which are to be used to assist in rehabilitating devastated France. The committee in charge has requested that the State waive its tax. You ask for my advice as to whether or not the State can waive the tax under this state of facts.

Section 25, chapter 912 of the Laws of 1920 provides:

“Every corporation holding any boxing or sparring match or exhibition under this act, for which an admission is charged and received, shall pay to the state treasurer five per centum of the total gross receipts, exclusive of any federal taxes paid thereon. Such payment shall be made within seventy-two hours after the holding of the contest.”

This provision of law is mandatory and applies to every boxing or sparring match or exhibition for which an admission is charged. The statute makes no exceptions. The exhibition to be given falls within the specific terms of the statute. I know of no power or authority lodged in any officer or board to waive the tax which the statute requires must be paid under any circumstances.

I, therefore, advise you that in my opinion the State cannot waive its tax even though the proceeds from the exhibition are to be devoted to a praiseworthy cause.

Dated, January 9, 1921.

CHARLES D. NEWTON,
Attorney-General.

To N. MONROE MARSHALL,
State Treasurer.

FOREIGN TRUST COMPANIES — RIGHT TO DO BUSINESS IN NEW YORK — BANKING LAW, SECTIONS 33-A, 33-B, 501, 186, 223.

Trust companies organized under the laws of other states cannot enter New York to do a banking business.

A memorandum of law in connection with the proposed application of the Union Trust Company of Chicago to do a banking business in this State has been received.

I do not believe the statutes will permit this institution to do a banking business in this State. In addition to the reasons stated in my letter to the Banking Department of December 13th I might add the following:

I will assume for the argument that the insertion of sections 33-a and 33-b in the banking article in the revision of 1914 did not change the law as it previously existed. In this connection I call your attention to section 501 of the present banking statute which declares that the provisions of the chapter shall be construed as a continuation of the provisions of chapter 10 of the laws of 1909 as amended and not as a new enactment.

Also, at the outset, both of us are agreed that by virtue of sections of 108 and 186 of the Banking Law of 1909 neither a foreign bank nor a foreign trust company could do business in this State prior to the amendment of 1911.

You rely a great deal upon the fact that section 186, both before and after the amendment of 1911, provided that no foreign corporation should exercise in this State any of the powers specified in certain subdivisions, leaving the inference that certain other powers not in those particular subdivisions, might be exercised here. I do not attach so much weight to this fact, because in 1909 there were no powers which a foreign bank or trust company could exercise in this State, and the omission to recite certain subdivisions was designed to keep the statute from running counter to our other general laws which, of course, permitted foreign corporations to lease, hold, purchase and convey property; to purchase, invest in and sell stock, etc. By the same reasoning I must also conclude that the omission of certain subdivisions in the amendment of 1911 had no other purpose, and that therefore the recital in the opening sentence of the present section 223, which by the way reads "corporation", generally and not as theretofore "foreign corporation", does not inferentially intend to open the door since 1914 for the exercise of banking powers in this State by a foreign trust company.

We must go back then for what authority there is to the amendment of 1911 which enacted sections 33-a and 33-b. At that time, I repeat, domestic trust companies had no banking powers, and trust companies were not considered by the legislature or by the

courts in this State as "banking corporations." I refer you to *Jenkins v. Neff*, 163 N. Y. 320; affirmed 186 U. S. 230, and to *People v. Binghamton Trust Co.*, 139 N. Y. 185. We would be justified accordingly in assuming that the words "banking corporations" as used in sections 33-a and 33-b did not apply to trust companies.

But what I rely upon more is the fact that if we construe those new sections as permitting a foreign trust company to conduct a banking business in this State, the Legislature gave to foreign trust companies a power which it denied to our own domestic companies. That has never been the policy of corporate legislation in this State, and indeed the reciprocal provisions regarding trust appointments indicate that foreign trust companies were not to be favored as against our local corporations.

You probably have noted also that the articles of the present Banking Law governing investment companies, savings and loan associations, etc., carry their own provisions with respect to foreign corporations (sections 303, 420.) It must be admitted that such corporations are in some respects "banking corporations", although they may not do the business of a bank. The result of this argument is the conclusion that the words "banking corporation" now appearing in sections 144 and 145 covered no corporations other than banks, in which article the sections were inserted by the legislature, thereby giving a legislative construction of their meaning both before and after 1914.

Furthermore, if you are granted a certificate to do business in this State you will violate at least the spirit of section 15 of the General Corporation Law and section 666 of the Penal Law because you will be operating under your title as a trust company, and yet be without trust powers in this State.

Altogether I feel that either the legislature or the courts should clear the matter up for us. I appreciate the time you have spent with this proposition, and yet I cannot bring myself to believe that your position is the more correct one. The question is difficult, and I assure you I have no certainty or pride in my own conclusion.

January, 11, 1921.

CHARLES D. NEWTON,
Attorney-General.

To HERVEY, BARBER & MCKEE,
New York City.

AMENDMENT OF SPECIAL CORPORATE CHARTERS WITHOUT LEGISLATIVE ACTION
— STOCK CORPORATION LAW, SECTION 18 — CONSTITUTION, ARTICLE III,
SECTION 14; ARTICLE VII, SECTION 1.

Corporations created by special legislative act may nevertheless file an amended certificate extending their objects and purposes.

The inquiry you present relative to corporations in your letter of January 13th has never been passed upon officially by the courts or by this office so far as I can find. Some months ago we discussed a similar situation, but no amended certificate was ever filed. On the one side it is argued that if section 18 of the Stock Corporation Law permits an amendment such as you have in mind, the corporation is in effect by filing the certificate, amending a statute of this State, namely, the special act under which it was chartered. The question immediately arises whether the Legislature intended to delegate this power, and whether the Legislature could so delegate it if it intended to do so. The legislative power is vested of course in the Legislature and the Constitution, article III, section 14, provides that no law shall be enacted except by bill. Those who incline to the view that you cannot file such an amended certificate, explain that section 18 in referring to a corporation organized "under any general or *special law*" intends to provide only for an instance in which a special law confers power upon certain persons to become a corporation by the execution and filing of a certificate. Where the special law itself incorporates the company, they say the statute is not applicable.

On the other side it is argued that the Legislature could not have intended to deny the privilege of extension of powers to a corporation which the Legislature had itself attended to by special act, and yet leave amendment open to corporations organized under general laws, and that the Constitution, article VIII, section 1, authorizing the creation of corporations by the Legislature was adopted only because the "objects" of such a corporation could not be attained under general laws. If, then, there are any further objects which a specially created corporation may be in a position to exercise, it may be contended that there can be no constitutional objection to conferring such powers upon a specially created corporation by following the same procedure (section 18, Stock Corporation Law) as obtains with a corporation organized under a general law.

The administrative difficulty presented if such amendments are possible is that the amended certificate will be on file with the Secretary of State and yet no original certificate there.

I cannot advise you officially for the matter may be presented to us by the Secretary of State at any time.

January 15, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO RUMSEY & MORGAN, *New York City.*

PUBLIC HEALTH LAW, SECTION 334 — HOSPITAL BUILDINGS — FIRE ESCAPES.

Section 334 of the Public Health Law requires buildings used for hospital purposes, which are not fire proof, of more than two stories, to be equipped with iron stairways on the outside. The term "local authorities" refers to officers charged with the enforcement of public safety statutes.

We have your letter asking certain questions in reference to section 334 of the Public Health Law. I will take them up in the order propounded.

1. It seems clear that the purpose of the act is that buildings used for hospital purposes which are not fire proof and of more than two stories in height shall have properly constructed iron stairways on the outside thereof, with doorway exits opening from each story above the first. A properly constructed stairway is one so built as to admit of the carrying of a helpless patient or person from the upper floors to the ground.

2. The statute seems to be broad enough to require these iron stairways to be constructed on the outside of all the stories of the building regardless of the fact of whether or not all the stories are occupied as a hospital.

3. The term "local authorities" undoubtedly refers to the official or officials charged by law with the enforcement of the public safety statutes who have power to contract and incur indebtedness on behalf of the municipality. If the officials charged with the enforcement of the public safety statutes do not have such power then the duty would devolve upon the local governing body, such as the common council or the board of trustees.

4. Where the stairways are erected by the local authorities the action for reimbursement may be instituted in the name of the city or village against the owner of the hospital or the trustees of the association conducting the same.

January 18, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO TIMOTHY E. ROLAND, *Albany, N. Y.*

EXECUTIVE LAW, SECTION 52 — EDUCATIONAL LAW, SECTION 1106 — DEPUTY COMMISSIONER.

Deputy State Treasurer may sign checks for disbursements made from the State Teacher's Retirement Fund during the absence of the State Treasurer from the office.

You direct my attention to section 1106 of the Education Law which was added by chapter 503 of the Laws of 1920. This section makes the State Treasurer a custodian and disbursing officer of the 'State Teachers' Retirement Fund for public school teachers. You inquire if the Deputy Treasurer, in the absence of the Treasurer, has authority to sign checks for disbursements made from this fund. The powers of the Deputy State Treasurer are provided for in section 52 of the Executive Law as follows:

"§ 52. *Deputy.* The treasurer shall appoint a deputy, for whose conduct he shall be responsible. Such deputy may perform any of the duties of the treasurer, except the duties of the treasurer as commissioner of the land office, commissioner of canal fund, and state canvasser. The treasurer may, by notice in writing filed with the state comptroller, designate his deputy to sign checks during his absence from the office. *Such deputy shall receive an annual salary to be fixed by the treasurer within the amount appropriated therefor by the legislature.*"

Section 1106 of the Education Law so far as material to this inquiry provides:

"1106. * * *

(3) The treasurer of the state of New York shall be custodian of the funds of the retirement system. Disbursements from the funds of the retirement system shall be made by the treasurer only upon authorization by the retirement board by resolution duly adopted at a meeting of the board by a majority of its members.

(4) * * * ."

It seems to me that this section merely imposes new duties upon the State Treasurer. There is nothing in this section or in article 43-b of the Education Law, relating to the State Teachers' Retirement Fund, which forbids the Deputy State Treasurer from performing, in the absence of the Treasurer, the duties imposed by said statute. Nor do the duties so imposed fall within the exceptions contained in section 62 of the Executive Law, denying

to the Deputy the powers to perform certain specific official duties, which must be performed by the Treasurer in person.

It is my opinion that the Deputy State Treasurer may sign the checks for the disbursements made from the State Teachers' Retirement Fund during the absence of the Treasurer from the office.

January 21, 1921.

CHARLES D. NEWTON,
Attorney-General.

To N. MONROE MARSHALL, *State Treasurer.*

CREDIT GUARANTEES — INSURANCE LAW, SECTION 170, PARAGRAPH 2.

Guaranteeing advice or recommendation upon the giving of credit is insurance and can be carried on only by companies subject to the State Insurance Law.

I have examined the guaranty which the Credit Clearing House proposes to issue in New York State, and which is recited in the opinion of the Attorney-General of Massachusetts. The corporation proposes to furnish not only information as to credit facts, but "agrees to accept full responsibility for any error of statement, advice or recommendation made in writing by itself or any agent, negligently or otherwise, which misleads and causes loss to the subscriber."

This so-called guaranty of your advice or recommendation upon the giving of credit is, I believe, insurance. Immediately, as your customer relies upon your expert advice and extends credit to a tradesman, you assume directly the risk of loss up to a specified amount. At no point does your customer share any risk up to the amount guaranteed. Quite differently, in the *Daily Credit Company* case, 162 A. D., 215; affd. 212 N. Y., 561, the Credit Company guaranteed only the accuracy of the facts furnished, and upon those facts the customer himself decided whether he would or would not give credit. The difference is between the guaranteeing of credit and the guaranteeing of the correctness of certain facts furnished.

It will hardly do to say that you are selling expert advice. Your customer does not care for your advice except that by holding it he has proof that you have assumed the hazard. As our courts said in determining that a contract was an insurance contract in a case where a corporation agreed to replace or pay for

plate glass if broken, and incidentally agreed to inspect the glass and reputty it when needed:

"The fact that the defendant's contract provides, in addition to the replacing of a broken glass to keep the glass puttied in the frame during the period of the contract is quite beside the mark. This provision of the contract is simply in the nature of an inspection, and is really for the protection of the company insuring the glass. Because the company agrees to inspect and to putty does not alter in any way the nature of the contract. No plate glass owner enters into one of these contracts, agreeing to pay a stipulated sum for the purpose of having his window glass puttied he takes it for the purpose of insuring himself against loss by reason of the breakage of the glass. It looks like an attempt to evade the provisions of the Insurance Law." (*People v. Standard Plate Glass Co.*, 156 N. Y. Supp., 1012.)

The State has recently had to deal administratively with the manufacturers of a check protecting machine, with the sale of which was issued the following guarantee, so-called:

"The original purchaser of F. & E. Check Writer, bearing serial number imprinted hereon, shall not suffer a monetary loss through a check being raised in excess of an amount originally and properly imprinted on its face by said machine."

The effect of this agreement is that, immediately upon the check being printed by the machine, the manufacturer of the machine assumes the direct risk that the check will not be raised and used to the loss of the maker, which is insurance against loss through forgery and larceny. The contract is not only that the machine will produce a certain product (*i. e.*, a check which cannot be raised) but also that the company will pay if such a check is raised *and used*. This is a financial risk. And as the risk is assumed directly by the manufacturer of the machine and is not borne by the user of the machine, we concluded it was insurance. The owner of the machine does not take any risk at all, as in the Credit Company case.

The same reasoning has been applied to a cattle food company which sold a conditioner, and with each sale furnished an agreement to pay for the loss of cattle, horses or pigs through death by contagious disease if the farmer feeds the product for three

months. After the expiration of the three months' period, the company assumed the entire risk of loss through death of the animals by contagious disease. In other words, the risk assumed by the company was not secondary or collateral to a risk existing with the owner, but all risk was assumed directly by the company.

I might add generally what Judge Lacombe said in *Tebbets v. Mercantile Credit Guarantee Co.*, 73 Fed. Rep., 95:

"Corporations entering into contracts like the one at bar may call themselves "guarantee" or "surety" companies, but their business is in all essential particulars that of insurers, who, upon careful calculation of the risks of such business, and with such restrictions of their liability as may seem to them sufficient to make it safe, undertake to assure persons against loss, in return for premiums sufficiently high to make such business commercially profitable. Their contracts are, in fact, policies of insurance, and should be treated as such."

Finally the Legislature has determined for us that the risk of credit is insurance (§ 170 Insurance Law, par. 2), and has provided for the incorporation of companies to carry on that business; and whatever we may argue your contract might amount to at common law, the guaranteeing or indemnifying of merchants "from loss and damage by reason of giving and extending credit to their customers and those dealing with them" has been made *insurance* through the simple declaration by the Legislature that it is insurance, and has by statute been assigned to insurance companies alone.

January 24, 1921.

CHARLES D. NEWTON,
Attorney-General.

To THOMAS BRENNAN, *Boston, Mass.*

CORRECTION IN CORPORATE NAME OR CHANGE THEREOF—GENERAL
CORPORATION LAW, SECTIONS 7, 60-65.

Under the circumstances presented, a substitution of "Community Groceteria Company" for "Community Grocerteria Company" is a change of name and not the correction of an informality.

We have your inquiry relative to the correction of the name of a corporation whose certificate you filed under the name of Community Groceteria Company, Inc.

We hardly think the proposed change to "Grocerteria" is the correction of an informality. As the Secretary of State has written you, the corporation is using a coined word for its name, and it is not apparent from the face of the certificate that there has been any error in stating it. Indeed throughout a month's correspondence with the Secretary of State your letters continued to spell the word "Grocerteria" with no intimation that a clerical error had crept in. Your certificate has it spelled "Grocerteria" in three places, in fact in all the places in which the name appears. The opinions of the Attorney-General which you cite were based upon the contents of the certificates themselves, whose provisions indicated that there had been an error. You base your claim to the change on statements not suggested by the paper you have on file.

Between two hundred thousand and three hundred thousand names are examined each time a certificate is presented for filing, and at least twenty-five or thirty certificates are returned each week for conflict or confusion of names. But the method of indexing by sub-letters the change in one or two letters would result in overlooking a corporation whose name was already on file. A very different administrative problem is presented today for the Secretary of State than in 1893 when fewer corporations had been created in this State under general laws.

We do not rest our determination that you are changing your name, instead of correcting it, entirely upon the facts we have stated, but rather that you are in contemplation of law changing your name and should follow the procedure set out in the statute (§§ 60-65 General Corporation Law) governing changes of name. Placing a *new* word in a corporate name is hardly the correction of an informality pursuant to section 7 of the General Corporation Law.

Altogether I deem it would be best for you to follow the method outlined by the statute for changing your name. It would be perhaps easier and less expensive than a mandamus proceeding in which we would have to disclose to the court the many instances where incorporators find shortly after organization that their name is not as desirable as some other, and attempt to correct it through the Secretary of State without a court order.

January 24, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO MILLARD FILLMORE TOMPKINS,
New York City.

REFUND OF TAXES AND CREDITS — TAX LAW, SECTION 218, SECTION 198.

Neither a refund nor a credit can be made upon a corporate franchise tax unless application has been made for revision within one year.

I have not the slightest hesitancy in advising you that the Commission and the Comptroller have no authority to refund a tax or give a credit under article 9-a of the Tax Law where no application has been made for a revision within one year. That is the period of limitation provided for in section 218 of the Tax Law. and is similar to the limitation provided in section 198. Limitations upon the right to review are of absolute necessity in taxing statutes, otherwise the state or municipalities would never be sure what funds were really available to meet the expenses of government. It is an old principle that taxes voluntarily paid cannot be recovered, and a statute of limitation simply fixes the date after which the law presumes the tax has been voluntarily paid.

I do not mean to say that a tax collected under an unconstitutional law should not in equity be refunded. That, however, is a matter for the Legislature to take care of by appropriation and through the Court of Claims, as was done in the case of the unconstitutional stock transfer tax (*Van Antwerp v. State of New York*, 218 N. Y. 422.)

In view also of our present plan to present an application to the Court of Appeals for a reargument of the Alpha Portland Cement Company case, I think you should advise Messrs. Funch, Edye & Co. and others so applying, that they ought to await the end of the litigation, and their claims then, if upheld by the final determination of the courts, will receive attention from the State authorities.

I return you the correspondence submitted.

January 25, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO STATE TAX COMMISSION.

COUNTY LAW, SUBDIVISION 5, SECTION 12; CHAPTER 321 OF THE LAWS OF 1898.

The board of supervisors is empowered in subdivision 5 of section 12 of the County Law to authorize the appointment of an additional deputy sheriff, and fix his salary, notwithstanding a previously enacted special law.

You ask to be advised as to the right of the board of supervisors of Oneida County to authorize the appointment of an additional deputy sheriff and to fix his salary. You also speak of the inadequacy of the present force to meet the requirements of

the county growing out of the unusual number of burglaries and other crimes which are prevalent in the country.

It is provided by chapter 321 of the Laws of 1898 that the sheriff of your county is entitled to appoint seven deputies who "shall receive an annual salary which shall be fixed and apportioned by the sheriff but which shall not exceed in the aggregate the sum of two thousand dollars in any one year." This act would prevail so far as the county of Oneida is concerned were it not for the provisions of subdivision 5 of section 12 of the County Law, which has been amended three times since the act of 1898, and provides that the board of supervisors

"shall have power to fix the amount and the time and manner of payment of the salary or compensation of any county officer or employee, except a judicial officer or an officer or employee of a county tuberculosis hospital * * *, notwithstanding the provisions of any general or special law fixing the amount of such salary or compensation or the time or manner of payment thereof, or fixing the term of office or providing for the mode of appointment, number or grade of any such county officer or of the clerks, assistants or employees in any county office, or vesting in any other board, body or commission or officer authority to fix such term of office or the amount of such salary or compensation or the time or manner of payment thereof * * * notwithstanding any general or special law" * * *.

This provision clearly places the authority upon the board of supervisors to authorize the appointment of all county employees, assistants, etc., except those specifically mentioned in the act, and this is so notwithstanding the provisions of any general or special law to the contrary; in other words, the provisions of the special act of 1898 relating to the appointment of deputy sheriffs in Oneida county were superseded by the County Law which has been hereinbefore partially quoted and such County Law must prevail over the special act.

I am, therefore, of the opinion that your board of supervisors is empowered to authorize the appointment of an additional deputy sheriff for the county and to fix his salary.

January 27, 1921.

CHARLES D. NEWTON,
Attorney-General.

To H. N. HARRINGTON, *Utica, N. Y.*

GENERAL HIGHWAY LAW, SECTIONS 282-286 — HEADLIGHTS.

The Secretary of State should not register a motor truck unless proof is furnished that it is equipped with lights to meet the requirements specified in section 286 of the Highway Law.

You state that a number of owners of motor trucks refuse to answer the questions relating to headlights. You ask for my opinion as to the construction to be given subdivision 4, section 286 of the Motor Vehicle Law considered in connection with the proof required by subdivision 1, section 282 of the same article.

Section 282, subdivision 1, of the Highway Law, as amended by chapter 684 of the Laws of 1920, so far as material to this inquiry reads as follows:

“ * * * The secretary of state shall require proof, in the application for registration, or otherwise, as he may determine, that the motor vehicle for which registration is applied for, is equipped with lights conforming in all respects to the requirement of this article, and no motor vehicle shall be registered unless it shall appear by such proofs that such motor vehicle is equipped with proper lights as aforesaid.”

There are two duties devolving upon the Secretary of State under this section:

First: He must require proof that a motor vehicle for which registration is applied for is equipped with lights conforming in all respects to the requirements of article XI of the Highway Law, known as the Motor Vehicle Law.

Second. To refuse to register a motor vehicle unless it appears by such proofs that it is equipped with proper lights.

The only provisions of law contained in article XI of the Highway Law which deal with light equipment for motor vehicles are found in section 286 of that law. Subdivision 4 of that section refers to the front lights on motor trucks of two tons carrying capacity or over, which are so governed or mechanically constructed or controlled that they cannot exceed a speed of fifteen miles per hour, and provides that such lights shall be visible for certain distances therein specified.

This section must be read in connection with section 282, subdivision 1, as amended, for it is incorporated into said section by reference and is made a vital part thereof. Reading these two provisions of law in conjunction, it is clear that before the Secretary of State is authorized to register a motor vehicle, he must require proof that such vehicle is equipped with lights that meet the requirements specified in section 286 of the Highway Law.

That it was the intent of the Legislature that before a motor vehicle should be registered, it should be equipped with proper lights, is clearly evidenced in the title of the act, amending section 282 of the Highway Law, wherein it is stated to be

“AN ACT to amend the highway law, in relation to requiring motor vehicles to be equipped with proper lights before registration shall be permitted.”

I fully appreciate that the construction I have placed upon this statute must result in certain hardships. The Legislature, however, in its wisdom, has seen fit to prescribe these requirements, and any relief must emanate from that body.

I, therefore, advise you that no motor truck should be registered by you unless proof is furnished that it is equipped with lights that will meet the requirements specified in section 286 of the Highway Law.

January 28, 1921.

CHARLES D. NEWTON,
Attorney-General.

To JOHN J. LYONS, *Secretary of State.*

HIGHWAY LAW, SECTIONS 287-288.

Ordinances of the village regulating the speed of motor vehicles cannot impose jail sentence for a violation thereof.

May a sentence of imprisonment be imposed on a person convicted of reckless driving?

Section 287 of the Highway Law (Motor Vehicle Law) requires:

“Every person operating a motor vehicle on a public highway of this state shall drive the same in a careful and prudent manner and at a rate of speed so as not to endanger the property of another, or the life or limb of any person; provided, that a rate of speed in excess of thirty miles an hour for a distance of one fourth of a mile shall be presumptive evidence of driving at a rate of speed which is not careful and prudent.”

This provision makes it only presumptive evidence of driving at a rate of speed which is not careful and prudent where the rate of speed is in excess of thirty miles an hour for a distance of one

fourth of a mile. This presumption is rebuttable, and, therefore, what constitutes reckless driving is to be determined from the facts and circumstances surrounding each case.

Section 290, subdivision 2, provides that "the violation of any of the provisions of section 287 of this article shall constitute a misdemeanor punishable by a fine not exceeding one hundred dollars.

Section 288 forbids local authorities from adopting any ordinance inconsistent with the statute. It also provides that "nothing in this article contained shall impair the validity or effect of any ordinances, regulating the speed of motor vehicles, * * * in any city of the first class; or in any city of the second class in a county adjoining a city of the first class;" provided, "further that local authorities of other cities and incorporated villages may limit by ordinance, rule or regulation the speed of motor vehicles on the public highways, such speed limitation not to be in any case less than one mile in four minutes, and the maintenance of a greater speed for one-eighth of a mile shall be presumptive evidence of driving at a rate of speed which is not careful and prudent," on condition that the city or village shall display a warning sign prescribed in the statute, and on the further condition that such ordinance, rule or regulation shall fix the punishment for the violation thereof, which punishment shall, during the existence of the ordinance, rule or regulation, supersede those specified in subdivision 2 of section 290 of this chapter, but except in cities of the first class, shall not exceed the same.

This section is a limitation upon the powers of local authorities to prescribe the punishment to be imposed for a violation of an ordinance, regulating the speed of motor vehicles. Subdivision 2 of section 290 provides that the punishment for a violation of the provision of law relating to speed is a fine of not to exceed one hundred dollars. This is exclusive and a jail sentence could not be imposed thereunder. The punishment that can be prescribed by local authorities for a violation of a local ordinance, rule or regulation established as provided in section 288 could equal but could not exceed that which is prescribed in section 290, subdivision 2. A local ordinance, rule or regulation, therefore, could not provide for the imposition of a sentence of imprisonment.

I desire to call your attention to section 14, subdivision 1 of the General Highway Traffic Law which provides as follows:

"Section 14. SPEED REGULATIONS. 1. Reckless driving is prohibited. Every person violating this provision shall be guilty of a misdemeanor and shall be punished by a fine not exceeding one hundred dollars for the first offense; and by a fine not exceeding one hundred dollars or imprisonment not exceeding six months or by both such fine and imprisonment in the discretion of the court for a second or subsequent offense.

* * * * *

Under this provision a sentence of imprisonment not exceeding six months could be imposed upon conviction for a second or subsequent offense.

Subdivisions 26 and 26-a of section 56 of the Code of Criminal Procedure do not prohibit or define the punishment for such offenses. It merely confers exclusive jurisdiction upon courts of special sessions to hear and determine charges for such violations. This is of no importance in the consideration of the inquiry you present.

January 29, 1921.

CHARLES D. NEWTON,
Attorney-General.

To C. W. LAMBERT, *St. Johnsville, N. Y.*

GENERAL HIGHWAY LAW, SECTION 281 — CHAUFFEUR.

A veteran operating a motor car in connection with his instruction in a vocational trade is not required to secure a chauffeur's license.

A Mr. Neubauer of Schenectady states that an ex-service man, twenty-five years of age, is in his shop learning the sign painting trade. That said person receives no compensation from him but is paid by the government for this vocational training. He further states that there are times when it is necessary for the person so engaged in learning the trade to operate a Ford motor car owned by Mr. Neubauer. You ask for my opinion as to whether it is necessary for the said ex-service man to be licensed as a chauffeur to entitle him to operate said car.

Section 289, subd. 4 of the Highway Law provides that:

"Unlicensed operators or chauffeurs cannot drive motor vehicle. An operator's license shall not entitle a person to drive a motor vehicle as an employee or for hire. No person shall operate or drive a motor vehicle upon a public

highway of this state after the first day of August, nineteen hundred and seventeen, unless such person shall have complied in all respects with the requirements of this section and of section two hundred and eighty-two of this act; * * *

Section 281 of the Highway Law defines the term "chauffeur" as follows:

"* * * The term 'chauffeur' shall mean any person operating or driving a motor vehicle, as an employee or for hire. * * *

The question to be determined is whether or not an ex-service man receiving vocational training and who receives no compensation from the person from whom he is receiving such instruction, is a "chauffeur" within the meaning of the term as defined in section 281.

It seems to me that this question should be answered in the negative. It is clear that he is not hired by Mr. Neubauer to perform any duties, neither is he paid by the government to operate a motor vehicle, but is merely made an allowance to cover his maintenance and support while receiving vocational instruction, nor is he employed by Mr. Neubauer within the meaning of the term as used in the statute for the relation of master and servant does not exist. It is not easy to define the relationship that exists between them, but it seems to me, under the facts presented, that the ex-service man in operating a Ford car in connection with his instruction in a vocational trade is not operating or driving a motor vehicle as an employee or for hire, and he is, therefore, not required to secure a chauffeur's license.

February 4, 1921.

CHARLES D. NEWTON,
Attorney-General.

To JOHN J. LYON,
Secretary of State.

CRIMINAL CODE, SECTION 56—PENAL LAW, SECTION 1897.

A justice of the peace has no jurisdiction to hear, try and impose sentence for a violation of section 1897 of the Penal Law, committed by a person over sixteen years of age.

Inquiry is made whether a justice of the peace has jurisdiction to try persons charged with violations of section 1897 of the Penal Law.

A violation of most of the provisions of that section by a person over the age of sixteen years is made a misdemeanor. No specific punishment is provided for, and, therefore, the punishment that could be imposed is provided for in section 1937 of the Penal Law, which reads as follows:

“A person convicted of a crime declared to be a misdemeanor, for which no other punishment is specially prescribed by this chapter, or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment in a penitentiary, or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both.”

The exclusive jurisdiction of a justice of the peace is prescribed in section 56 of the Code of Criminal Procedure. Violations of section 1897 of the Penal Law are not specifically included in the subdivisions of section 56. Although by subdivision 38 of section 56 a justice of the peace has jurisdiction of misdemeanors not specifically included in the subdivisions of that section, his jurisdiction is limited to misdemeanors which are or may be punishable by a fine not exceeding fifty dollars or by imprisonment for six months, and in the case of such misdemeanors, the person charged is entitled under section 211 of the Code of Criminal Procedure to elect as to whether he will be tried by a court of special sessions or await the action of the grand jury.

I, therefore, advise you that in view of the fact that the punishment prescribed by section 1937 of the Penal Law, being in excess of a fine of fifty dollars or imprisonment for a period of more than six months, that a justice of the peace will not have jurisdiction to hear, try and impose sentence for violations of section 1897 of the Penal Law committed by a person over sixteen years of age. You could, however, give them an examination and hold them for the grand jury in case they do not chose to waive examination. A justice of the peace would have jurisdiction to try offenses committed by persons under sixteen years of age for the statute provides that they are guilty of juvenile delinquency.

February 1, 1921.

CHARLES D. NEWTON,
Attorney-General.

To D. S. HUTCHINS,
Marlborough, N. Y.

STATE WORLD WAR MEDAL — CHAPTER 122, LAWS 1919.

Only persons who entered the military or naval service of the United States during the World War are entitled to medal or ribbon authorized by chapter 122, Laws 1919.

Persons who served in civilian capacities are not entitled to such medal or ribbon.

We have an inquiry relating to service medals. I advise you that in my opinion chapter 122 of the Laws of 1919 was not intended to provide medals for persons who served the United States in civilian capacities during the World War. Where the statute refers to persons who entered the service "as a volunteer or otherwise" I think the words "or otherwise" were intended to cover drafted men and those who were voluntarily inducted before being actually drafted. To hold that the medal was intended to be awarded to persons other than those entering the military or naval service would make it necessary to award medals not only to all the employees of war-time industries taken over by the United States, but to every employee of the railroads, telephone, telegraph and cable companies, etc. I do not think that this was contemplated by the Legislature.

February 11, 1921.

CHARLES D. NEWTON,

To J. LESLIE KINCAID,
The Adjutant-General.

Attorney-General.

STATE BOARD OF ARMORY COMMISSIONERS — BROKER'S FEE — SALE OF ARSENAL
— CHAPTER 584, LAWS 1920.

Payment of broker's fee for sale of State Arsenal Property in New York City is not authorized under chapter 584, Laws 1920.

You inquire "as to whether or not, under chapter 584 of the Laws of 1920, the Armory Commission is authorized to pay a broker's fee on the sale of the State arsenal in the city of New York."

The first legislation on the subject referred to in your letter was chapter 898 of the Laws of 1911 which was subsequently amended by chapter 387 of the Laws of 1912, 636 of the Laws of 1918, 584 of the Laws of 1920, which last act shows the present status of the law bearing on this matter.

Chapter 584 of the Laws of 1920, as far as relates to your inquiry, provides as follows:

"§ 1. The armory commission of the state is hereby authorized to enter into a contract on behalf of the people of the state for the sale of the state arsenal lands and build-

ing situate at Seventh avenue and Thirty-fifth street, borough of Manhattan, city of New York, with such person or persons or body corporate as may desire to purchase the same for such sum as it may be able to obtain by public sale after due publication and advertisement or in such other manner as may be determined by the armory commission to be for the best interests of the State.

“§ 2. The Comptroller of the state is hereby authorized and directed upon the final payment of the purchase price as specified in the contract authorized by the preceding section, to convey, on behalf of the people of the state, to the purchaser or purchasers named in said contract, or other lawful representatives or assigns, the tract or parcel of land and building thereon now owned and occupied by the state as a state arsenal in the city of New York, borough of Manhattan, situate at Seventh avenue and Thirty-fifth street. The proceeds from the sale of such state arsenal lands and building shall be paid into the state treasury as provided in section thirty-seven of the state finance law.”

This law does not provide for the payment of any expenses incidental to the sale of the land in question out of the proceeds of such sale or otherwise. It does specifically provide that: “The Comptroller of the state is authorized and directed *upon the final payment of the purchase price as specified in the contract*,” etc., and further that: *The proceeds from the sale of such state arsenal lands and building shall be paid into the state treasury as provided in section thirty-seven of the state finance law.*”

I, therefore, conclude that you would not be authorized to pay a broker's fee on the sale of the State arsenal property in the city of New York, for the reason that there is no provision in the law for the payment of any such expenses, and I do not believe that the right to incur such an expense could be easily inferred from said act.

As the Legislature is now in session, it might be possible for you to have the law amended so as to provide for the payment of necessary and proper expenses and disbursements, including a broker's fee, out of the proceeds of the sale, or you might be able to have an item put in the budget to cover these incidental expenses.

February 14, 1921.

CHARLES D. NEWTON,
Attorney-General.

To STATE BOARD OF ARMORY COMMISSIONERS. igitized by Google

PUBLIC SERVICE COMMISSIONS LAW, SECTION 71 — COUNSEL.

It is the duty of municipal boards to protect the rights of taxpayers. In a proceeding to change the rates charged by a public service corporation, the necessary expenses for attorney's and expert's fees are proper municipal charges.

Inquiry is made as to the authority of the board of trustees of a village to audit and allow out of the village funds the necessary expenses for attorney's fees and fees of experts employed to contest before the Public Service Commission a proceeding to change the rates to be charged by a public service corporation, furnishing gas or electricity to a municipality.

I beg to advise you that I know of no statute which in specific terms authorizes the expenditure of village funds for such purpose.

Section 71 of the Public Service Commissions Law authorizes a proceeding by the trustees of a village before the Public Service Commission against a person or corporation authorized to manufacture, sell or supply gas or electricity for light, heat or power, relative to the kind of service and the prices charged. The fact that this section gives the power to the board of trustees in the first instance to institute a complaint against a person or corporation furnishing gas and electricity to a municipality necessarily gives such village the implied power to contest any proceeding instituted by the person or corporation furnishing the gas or electricity.

The power to institute and contest the various conditions of the service and the rate would necessarily carry with it the implied power to incur the reasonable and necessary expenses to substantiate the complaint or to defend the attempt of the corporation furnishing such gas or electricity to increase its rates.

It is not only the power, but the duty of municipal boards to protect the rights of the taxpayers when their interest becomes involved in such a proceeding, and the reasonable expense necessarily incurred in doing this is unquestionably a proper municipal charge. Such power is necessary for the proper and efficient conduct of the affairs of the municipality, and, is therefore, inherent.

February 23, 1921.

CHARLES D. NEWTON,
Attorney-General.

To R. E. HARCOURT,
Medina, N. Y.

BOXING LAW — TRAINING EXHIBITIONS — LICENSES.

Training exhibitions by professional boxers at which an admission fee is charged, are forbidden under the provisions of the Boxing Laws.

The following question is presented:

"It has been called to our attention that numerous gymnasiums, where boxers train for their fights, are making an admission charge to spectators who watch these training exhibitions.

Will you kindly advise us whether in your opinion, this is a violation of section 3 of the Boxing Law and if the Commission should compel gymnasiums, where this custom is followed to take out licenses?"

Section 3 of the statute provides:

"Boxing and sparring matches or exhibitions for prizes or purses, or where an admission fee is received, are hereby allowed except on Sundays. The commission shall have and hereby is vested with the sole direction, management, control and jurisdiction over all *such* boxing and sparring matches or exhibitions to be conducted, held or given within the State of New York. * * *

We can readily understand that exhibitions carried on in the way you describe might in many cases amount to only technical violations of the law. Nevertheless, such exhibitions might possibly grow into a most serious evil. There can be no doubt but that such exhibitions as you describe come within the four corners of the statute as I have quoted it.

It is, therefore, my opinion that your inquiry should be answered in the affirmative, and such exhibitions forbidden unless the proprietors and others concerned are properly licensed.

Feb. 23, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO STATE ATHLETIC COMMISSION.

GENERAL BUSINESS LAW, SECTION 71 — PRIVATE DETECTIVES.

Comptroller may accept as satisfying the requirements of the statute, as to character, a certificate of five freeholders of any county where applicant has resided, where applicant has not resided in the county of his present residence for a period of five years.

The State Comptroller is in receipt of an application for a private detective license by an individual, residing in Kings county, whose application in all respects meets the requirements

of the statutes, except that the applicant is unable to furnish the approval of five freeholders of Kings county, for the reason that he has resided in said county for only a short time, but furnishes in lieu thereof the approval of five freeholders of an adjoining county, where he formerly lived. Inquiry is made if his application must be rejected solely because of his inability to furnish the approval of five freeholders of the county of his present residence.

Article VII of the General Business Law is an act to regulate and license the business of private detectives and detective agencies. Section 71 of that article provides for the application for a license to conduct such a business. Where the applicant is a person that section, among other things, requires that such person shall have the application approved

“ * * * by not less than five reputable citizens, freeholders of the county where such person or individual resides or where it is proposed to own, conduct, manage or maintain the bureau, agency, subagency, office or branch office for which the license is desired, each of whom shall certify that he has personally known the said person or individual for a period of at least five years prior to the filing of such application, that he has read such application and believes each of the statements made therein to be true, that such person is honest, of good character and competent, and not related or connected to the person so certifying by blood or marriage. * * * ”

The Legislature has undertaken to regulate and control this well recognized and legitimate business of conducting a detective bureau or agency in the public interest. The Comptroller has been vested with the authority to issue such licenses, and a liberal discretion has been lodged with that officer in respect to the granting, withholding and revocation of such licenses. The Comptroller, as such licensing officer, is required to be satisfied as to the character, competency and integrity of the person or persons seeking such license.

To construe that part of the statute, requiring the application to be approved by at least five freeholders of the county where the applicant resides, to mean the county in which he resides at the time of the filing of the application, seems to me to violate its spirit and purpose and would inject the grave question of the reasonableness of such a requirement.

As I have already stated, the purpose of the statute is to protect the public, and to check the evils and abuses that grew out of the uncontrolled and unregulated business of conducting detective bureaus and agencies. The purpose in requiring certain facts and certificates to be filed in connection with the application is to enable the licensing officer to determine the character, competency and integrity of each person seeking a license to conduct such a business.

I do not believe it was the intent or purpose of the Legislature to deny to a person, of good moral character, competency and integrity, the right to engage in such a legitimate business, where he was unable, by reason of change of residence, to secure the certificate of five freeholders of the county of his present residence where he could secure the certificate of five freeholders of a county where he has resided for at least five years. For that reason I believe the statute, so far as it relates to this requirement, should be liberally construed. The term "resides" should not be given a technical or limited meaning, but should be given a broader significance and held to mean "has resided."

I am of the opinion, that, if the Comptroller is satisfied as to the character, competency and integrity of the applicant that he would be justified in accepting, as fulfilling the requirements of the statute, the certificate of five freeholders of any county where the applicant has resided for five years, in a case where the applicant is unable to furnish the certificate of the five freeholders of the county of his present residence, solely on the ground that he has not resided in the county of his present residence for a period of five years.

February 26, 1921.

CHARLES D. NEWTON,
Attorney-General.

To JAMES A. WENDELL, *State Comptroller.*

ARCHITECT — PRACTICING, GENERAL BUSINESS LAW.

One practicing as an architect continuously for a period of two years prior to the passage of article 7-A of the General Business Law, and advertising and styling himself an architect without earning the certificate as a registered architect, would not have the right to add the words registered architect without a certificate from the State Board of Regents.

My opinion is asked as to whether or not an architect who has been practicing in this State prior to the passage of the

Architect's Law, known as chapter 454 of the Laws of 1915, is qualified and has the right to practice as an architect without securing registration by earning certificate from the Board of Regents of the State of New York, provided such architect has practiced two years prior to the enactment of this specific law.

This question has been fully determined in an opinion of the Attorney-General, bearing date of March 14, 1916, found in Attorney-General's Report for the year 1916 at page 159. If you have been continuously practicing as an architect in this State for two years prior to the passage of article 7-a of the General Business Law, known as chapter 454 of the Laws of 1915, and you were advertising and styling yourself as covering that period as an architect, you may continue to style yourself as an architect without earning the certificate as a registered architect. If you were not advertising yourself covering that period of time and down to the present time, I doubt if you have a right to begin doing so now.

The fact of your having been practicing architecture for more than two years prior to the passage of the above law would not give you the right to add the words "registered architect, or R. A." to your name without the certificate from the State Board of Regents as a registered architect.

Subdivision 3 of section 79 of article 7-a of the General Business Law provides:

"3. The board of examiners in lieu of all examinations shall accept satisfactory evidence as to the applicant's character, competency and qualifications, and that he has been continuously and exclusively engaged in the practice of architecture for more than two years next prior to the date when this article shall take effect; or satisfactory evidence that the applicant has been actually and exclusively engaged in the practice of architecture on his own account or as a member of a reputable firm or association for more than one year prior to the date when this article shall take effect; providing the application for such certification shall be made within one year of such date."

This subdivision of section 79 fixes a time when one should apply for a certificate as a registered architect, and it seems where one has been engaged continuously and exclusively in the practice of architecture for more than two years next prior to the date when the above article takes effect, or satisfactory evidence that the applicant has been actually and exclusively engaged in

the practice of architecture on his own account, or is a member of a reputable firm or association for more than one year prior to the date when this article shall take effect, must apply for such certificate within a year of such date.

Letters to you under date of March 9th, 1917, and March 21, 1918, accompanying your letter to me, from Herbert J. Hamilton, Assistant, Professional Examinations, apprise you of your right to engage in the practice of architecture, and use the word "Architect." You have actually exercised that right prior to the registration law above cited. If you have conformed to the provisions of this law by advertising and styling yourself as an architect prior to its passage, and have continued to practice as an architect, you have the right at this time to continue to style yourself as an architect and sign work performed by you as such, but under no circumstances have you the right to sign your name as a registered architect without such certificate from the State Board for the Registration of Architects.

March 3, 1921.

CHARLES D. NEWTON,
Attorney-General.

To GEORGE S. HAIGHT, *Mt. Vernon, N. Y.*

SAVINGS BANK INVESTMENTS — RAILROAD BONDS — BANKING LAW,
SECTION 239.

The exemption period continuing railroad bonds as investments for savings banks following relinquishment of Federal control is two years beginning March 1, 1920.

Your query adverts to the provision in section 239 of the Banking Law, adopted in 1919 and 1920, which provides that "the time during which any railroad is operated by the government of the United States * * * and two years thereafter, and the earnings made and dividends paid during said time and said two years thereafter shall not be taken into consideration in determining whether the bonds of the railroad corporation comply with any of the provisions of this section."

Federal operation ceased on March 1, 1920, under the Transportation Act of February 28, 1920, but the Federal government by that act guaranteed certain earnings to the railroads for a period of six months thereafter. It also preserved to the railroads existing rates until September 1, 1920, and made pro-

vision for further loans of government moneys to enable the carriers to properly serve the public during the transition period following the determination of Federal control.

By reason of this continued Federal activity on behalf of the railroads, it has been assumed by some persons, you state, that after March 1, 1920, there was still a Federal *financial control* which would carry bonds of certain railroads (railroads which do not comply with section 239 on the earning basis) on the legal investment list for two years from September 1, 1920, instead of for two years from March 1, 1920, pursuant to the exemption given in section 239.

I cannot believe that this is so. The word used in our statute is "operated," and the Transportation Act states definitely that Federal control, that is "the possession, use, control and operation of railroads," terminated on March 1, 1920, and that from that day the President no longer could exercise powers theretofore conferred upon him relating "to the use or operation of railroads." (§ 2, Title I; § 200, Title II.)

After March 1, 1920, the railroads were conducting their own business and the earnings derived from business done were the result of their own efforts. If these earnings are not sufficient to comply with section 239, surely no additional assistance from the Federal government should be the reason for continuing the exemption when the very purpose, to my mind, of the exemption added in 1919 and 1920 was to protect the earning record of the railroad from the loss of earnings due to the fact the company was not itself operating the lines.

My view is that the two-year period starts from March 1, 1920.

March 7, 1921.

CHARLES D. NEWTON,
Attorney-General.

To WOOD, STRUTHERS & Co., *New York City.*

NOTARIES PUBLIC—VALIDATING ACTS.

Invalid acts of a Notary Public may be validated under the legalizing acts of the legislature upon the payment of the legal fees and the filing of the certificate at any time.

It is stated that on March 30, 1916, the term of office of a notary public expired, but that he has since continued to act as such notary public although he was not reappointed. You inquire if the annual acts of the legislature to legalize and confirm the

official acts of a notary public would be sufficient to validate his acts or would it be necessary to secure the passage of a special act of the Legislature to cover the specific case.

The Legislature for a number of years has passed annually an act legalizing and confirming the official acts of a notary public or commissioner of deeds affected, impaired or questioned by reason of certain conditions or events enumerated in the statute. These acts are passed primarily for the purpose of protecting and safeguarding property rights and the rights of individuals affected, and for that reason should be given a liberal construction to carry out their spirit and purpose.

These acts have been passed for a period of time in excess of that covered by the inquiry. There is no limitation as to the time when the conditions of the statute must be complied with.

It would seem to me that a notary public or commissioner of deeds, who has acted in good faith, and, whose acts are invalid for any of the reasons specified in the legalizing acts, can validate his acts by paying the legal fees for holding such office or filing such certificate.

The acts of a notary public or commissioner of deeds affected or impaired by reason of the expiration of the term of office are legalized and confirmed by said acts, and, therefore, they are sufficient to cover the specific case in question.

March 5, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO LUTHER C. WARNER, *Albany, N. Y.*

CHURCH PROPERTY EXEMPT FROM TAXATION.

Real or personal property belonging to a church corporation, used exclusively for the moral and mental improvement of men and women is exempt from taxation under section 7 of the Tax Law.

I am advised that the M. E. Church Society of Cincinnati owns a parsonage which is not occupied by the preacher (or anybody else), but he lives in a house in another part of his charge. Such parsonage is used occasionally in which to hold entertainments for the benefit of the church. The town assessors have placed said parsonage upon the assessment roll as liable for taxes, the supervisor accordingly extended the tax against the property.

The collector upon demanding payment from the trustees was met by a refusal, they claiming that it was exempt from taxation under the law. Are the trustees, or are the assessors, correct?

Replying thereto would say this is church property and as such under subdivision 2 of section 4 of the Tax Law is exempt, it not being used for any purpose, other than for the benefit of the church, and as church property should not have been put on the assessment roll.

Subdivision 7 of section 4 of the Tax Law provides:

"Subdivision 7. The real property of a corporation or association organized exclusively for the moral or mental improvements of men or women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, scientific, literary, library, patriotic, historical or cemetery purposes, or for the enforcement of laws relating to children or animals, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes, and the personal property of any such corporation shall be exempt from taxation. * * *."

There can be no other interpretation of this law, and even if the building was rented if the money received therefrom was used for religious purposes or for charity, growing out of church work, I have my serious doubts about the same being liable for taxes.

March 8, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO FRANK E. JORDAN, *Cincinnati, N. Y.*

MARRIAGE CONTRACTS — SECTION 6, DOMESTIC RELATIONS LAW.

A person who submits to a marriage ceremony with one who has a living husband or wife is free to contract marriage with another, the former ceremony being *eo ipso* a nullity.

This office is in receipt of a copy of a letter addressed to the Governor from Norman H. Davis, Under-Secretary of State, Washington, D. C., also a copy of a communication to the United States Secretary of State from the Royal Danish Legation at Washington of date of February 19th, 1921, the latter communication setting forth the following state of facts:

"A Dane by the name of Otto Overgaard Nielsen arrived in New York September 1st, 1917, and on October 29th of the same year he married one Emilie Abeles in New York. For three days only they lived together, then he left her because he had been informed that she was already married, that her husband had been away for two years as a soldier on the German front and that she was expecting a child with some other man."

The Danish Legation wishes to know whether said Otto Overgaard Nielsen is free to marry again or whether his marriage in New York need be dissolved by the authorities.

Replying thereto I beg to advise that, under section 6 of the Domestic Relations Law,

"A marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living unless either:

1. Such former marriage has been annulled or has been dissolved for a cause other than the adultery of such person; provided, that if such former marriage has been dissolved for the cause of the adultery of such person, he or she may marry again in the cases provided for in section eight of this chapter and such subsequent marriage shall be valid;

2. Such former husband or wife has been finally sentenced to imprisonment for life;

3. Such former husband or wife has absented himself or herself for five successive years then last past without being known to such person to be living during that time."

The courts have held that since a void marriage is void from its inception, irrespective of whether it has been judicially decreed a nullity, a person whose attempted marriage is void is in no wise disqualified from marrying again; and this is true even though the attempted marriage of such person has not been judicially decreed void. (*McCullen v. McCullen*, 162 App. Div. 599; *Stein v. Dunne*, 119 App. Div. 1; affirmed, 190 N. Y. 524.)

I, therefore, hold that a person attempting to contract marriage with one who has a living husband or wife is free to contract marriage, the former ceremony being *eo ipso* a nullity; but in the absence of a judicial decree declaring the same to be a nullity the responsibility rests upon the innocent party to be in possession

of sufficient proof to establish the bigamous act, provided the same should come before the court for a judicial determination.

March 8, 1921.

CHARLES D. NEWTON,
Attorney-General.

To C. TRACEY STAGG,
Counsel to Governor.

**MARRIAGE SOLEMNIZED BY A NON-RESIDENT MINISTER OR CLERGYMAN —
SECTIONS 11, 12, 225 OF THE DOMESTIC RELATIONS LAW.**

There is no statutory prohibition against a non-resident clergyman or minister performing a marriage ceremony within this State.

A communication directed to the Governor of this State, relative to a non-resident clergyman's right to perform a marriage ceremony in New York, has been referred to this office for reply.

Section 11 of the Domestic Relations Law prescribes that "a clergyman or minister of any religion" may solemnize a marriage. Sections 12 to 25, inclusive, set forth the statute law of this State in relation to marriage ceremonies, section 14 prescribing that a license must be provided and attached to such license a certificate, which must be assigned by the officiating clergyman or officer and such license with the certificate must be returned to the office of the town or city clerk who issued the same on or before the tenth day of the month next succeeding the date of the solemnizing of the marriage. Section 17 places certain duties and responsibilities upon the officiating clergyman as follows:

"If any clergyman or other person authorized by the laws of this state to perform marriage ceremonies shall solemnize or presume to solemnize any marriage between any parties without a license being presented to him by them as herein provided, or with knowledge that either party is legally incompetent to contract matrimony as is provided for in this article, he shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment for a term not exceeding one year."

I find nothing in the statute limiting the authority to solemnize marriages to resident clergymen and I am of the opinion that a clergyman or minister of any religion is authorized by law to per-

form marriage ceremonies under our statute and would come within the provisions of the wording of the marriage license and certificate attached thereto.

March 10, 1921.

CHARLES D. NEWTON,
Attorney-General.

To REV. CHARLES W. TYLER,
Haverhill, Mass.

MILITARY LAW—SECTION 19-A AS ADDED BY CHAPTER 557, LAWS 1918—
RETIREMENT OF CIVIL WAR VETERAN.

To be entitled to retirement under said chapter a Civil War veteran must have been employed for a continuous period of ten years or more in the office of the Adjutant General of the State of New York.

You ask whether or not ten years' service in the office of the Adjutant-General is a condition precedent to the retirement of a Civil War veteran employed in your office in case of incapacity under the provisions of chapter 557 of the Laws of 1918.

Chapter 557 of the Laws of 1918 added section 19-a to the Military Law, which provides that:

"Every soldier, sailor or marine of the army or navy of the United States in the late civil war honorably discharged from the service who shall have been employed for *a continuous period of ten years or more* in the office of the adjutant-general of the state of New York and who shall have reached the age of seventy years may, upon his own request and the approval of the adjutant-general, or upon being incapacitated for performing the duties of his position, shall be retired from such employment, and thereafter during his life the adjutant-general shall pay to him in the same manner that the salary or wages of his former position were customarily paid to him an annual sum equal in amount to one-half the salary or wages paid to him in the last year of his employment; provided, however, that the amount so to be paid to such retired veteran shall not exceed the sum of one thousand dollars per annum."

I am of the opinion in order that a veteran of the Civil War, who is an employee of the Adjutant-General's office, may be retired under article 1, chapter 41 of the Laws of 1909, constituting chapter 36 of the Consolidated Laws as amended by chap-

ter 557 of the Laws of 1918, it must appear that such veteran has been employed for a continuous period of ten years or more in the office of the Adjutant-General of the State of New York. This service of ten years is an absolutely necessary condition precedent to his right to retirement, and without which, he does not come under the provisions of such act.

March 12, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO EDWARD J. WESCOTT, *The Adjutant-General's Office.*

SALE OF BONDS — BROKERAGE FEES.

Municipal authorities have power to pay reasonable brokerage fees incurred in the sale of municipal securities. Drainage commission has no authority to negotiate the sale of drainage bonds.

Your letter in relation to the sale of bonds for an improvement under the Drainage Law, received. You state that an unsuccessful effort has been made to sell the bonds, owing to the low rate of interest, but that the same could probably be negotiated at par provided the broker's fees are paid for negotiating the same. You inquire if the town has authority to pay the brokerage fees for the sale of bonds, assuming they are sold at par, and, also, whether the drainage commissioners have authority to pay the brokerage fees for the sale of bonds and charge this as an expense of the project.

In this connection I would call your attention to the case of *Armstrong v. Village of Fort Edward* (84 Hun, 262), in which case was involved the question of the employment of brokers to negotiate a sale of village bonds. At page 265 Judge Herrick, writing the opinion of the court, states:

"I think it may be fairly implied that municipal authorities in issuing bonds have the right as an incident to such power, and in fact in a business sense it may be said to be necessary to the exercise of such power, to use the customary and ordinary business agencies in negotiating or selling their bonds, as, for instance, to place them in the hands of bond brokers or bankers, who make a business of dealing in such securities, and who have greater facilities for disposing of them, as was done in this case of *Brownell v. Town of Greenwich* (114 N. Y. 519), and to pay such persons the ordinary commission upon the sale of such securities."

"When a municipal corporation is authorized to borrow money, it goes into the money market as a private individual, or a business corporation, and to negotiate its loans to advantage it may make use of the ordinary business agencies to procure the needed money and float its securities."

In view of this authority it would seem that the ordinary brokerage commissions for the sale of municipal securities would be a proper municipal charge.

As respects the power of the drainage commissioners to pay the brokerage commissions and include the same as a part of the expense of the project, I beg to advise that I am very much in doubt if the commissioners have any such power or authority. It does not seem to me that the expense of negotiating bonds is an expense incurred in connection with the prosecution of the improvement. In this connection I am assuming that the commissioners have no authority to negotiate the bonds, but that the sale of the bonds devolves upon the town officials.

March 17, 1921.

CHARLES D. NEWTON,
Attorney-General.

To M. J. WHEDON, *Medina, N. Y.*

HIGHWAY MAINTENANCE — SECTION 207 OF THE HIGHWAY LAW.

Where the boundary of a municipality is coterminous with the boundary of a highway, the care and maintenance of such highway devolves solely upon the municipality in which the highway is located.

Counsel of the town board of Greenport, Columbia county, desires an interpretation of section 207 of the Highway Law as applied to a situation arising between such town and the city of Hudson upon the following state of facts:

"Prior to 1900 a turnpike road ran through a portion of the town of Greenport. About that time the turnpike was abandoned and the road became a town road. Subsequent to that time the city of Hudson extended its territory making the survey line or the territory taken in the City run to the fence along the westerly side of the Highway, it being the intention of the City to limit their line to the extreme edge of the Highway."

The question you present for determination is—

“Is the city of Hudson under Section 207 of the Highway Law liable for half the expense of maintaining the highways so far as it adjoins the city line?”

The portion of said section 207 in relation to the joint liability of a town and city for the maintenance of a highway or highways is as follows:

“All highways heretofore laid out *upon* the line between any two towns or between a town and a city or an incorporated village shall be divided and allotted or re-divided and reallocated, kept in repair in the manner above directed.”

I beg to call your attention to the fact that the statute applies to highways laid out upon the boundary line and not highways laid out or constructed along or adjacent to a boundary line. In other words, section 207 is applicable where the center of the highway or any portion thereof is the dividing line between the two municipalities. From the state of facts set forth it appears that the boundary line of the city of Hudson is coterminous with the boundary line of the highway, making the whole of said highway within the town of Greenport, no portion thereof being within the boundaries of the city of Hudson. This being true, the care and maintenance of said highway devolves solely upon the town of Greenport.

March 22, 1921.

CHARLES D. NEWTON,
Attorney-General.

To JOHN L. CRANDALL, *Hudson, N. Y.*

LEGISLATIVE BILLS — ARTICLE 12, SECTION 2 AND ARTICLE 3, SECTION 18 OF
THE STATE CONSTITUTION.

Using a term in a bill which indicates municipalities of certain populations makes it a general bill. To name a particular city makes it a city bill.

There is submitted a proposed act entitled “To amend the election law generally,” and you therein call my attention to all sections of said act wherein under the present law the phrase is used “cities of over one million inhabitants” and the amendment substitutes for such phrase the words “city of New York.” You desire to know if by these changes the said proposed act is to be regarded as a city bill requiring transmission to the mayor and also whether any provision of the constitution relating to local or special acts is violated.

I beg to advise that the original phraseology, namely, “cities of over one million inhabitants” was advisedly used by the Legis-

lature in order to obviate the necessity of submitting such provisions of the law to the mayor as provided by article 12, section 2, of the Constitution. The substitution of the words "the city of New York" would undoubtedly make such sections local and not general and the bill would of necessity be submitted to the mayor for approval or disapproval. The courts have repeatedly construed the term "cities of over one million inhabitants" to be general and not local in its nature. (*Sun Printing, etc., Assn., v. N. Y.*, 8 App. Div., 230; affirmed 152 N. Y., 257; *Admiral Realty Co. v. N. Y.*, 206 N. Y., 110.)

Further, by using the phrase "the city of New York" in the proposed act there would exist a violation of the prohibition contained in article 3 of section 18 of the Constitution which provides that no private or local bills shall be passed for the "opening and conducting of elections or designating places of election."

The courts have laid down the rule generally to determine whether a bill is local or general as follows: It is a local or private bill if relative to a particular locality or to particular persons or things of a class, but it is general if it is applicable to all within a certain class and does not distinguish between localities, individuals or things, even though by reason of a limitation in its scope or of circumstances existing at the time of its enactment, the cases actually falling within the range of its operation are limited in number.

Coler v. Brooklyn Daily Eagle, 153 App. Div., 300,
People v. Dunn, 157 N. Y., 528, *Kittenger v.*
Buffalo Traction Co., 160 N. Y., 377.

I therefore conclude that the purposed act by using the term "the city of New York" in place of the term "cities of over one million inhabitants" violates section 2 of article 12 and section 18, article 3 of the Constitution.

March 28, 1921.

CHARLES D. NEWTON,
 Attorney-General.

To BENTON S. RUDE, *Legislative Bill Drafting Commission.*

BARGE CANAL — CANAL BOATS OR TUGS BUILT IN CANADA OR OWNED BY CANADIANS MAY NOT MAKE USE OF THE SAME FOR INTRASTATE TRAFFIC.

Canal boats or tugs built in Canada or owned by Canadians may not be employed to carry cargo from one point or place to another on the canals of this State.

I am not aware of any statutory provision authorizing any State officer to prevent the navigation on the Barge Canal or other navigable waters of this State of a canal boat or tug boat for the reason that it was built in Canada or for the reason that it is owned or operated by Canadians or other than citizens of the United States. And I entertain grave doubts that any valid State legislation could be enacted to accomplish this result. I am inclined to believe that such legislation would contravene the provisions of the commerce clause of the Federal Constitution. However, this might depend upon the form of the legislation, and, inasmuch as I am presented with no specific proposition, I prefer not to express any definite opinion on the question at this time. If any such legislation is seriously contemplated I will be pleased to give the matter further and more careful consideration.

I find, however, in the provisions of title 50 of the United States Revised Statutes entitled "Regulation of vessels in domestic waters" certain provisions which, it seems to me, cover the situation and operate to forbid the operation on the canals and canalized rivers of the State (which, as I regard it, constitute navigable waters of the United States) of foreign owned canal boats and steam tug boats.

The general purport of this legislation is to forbid vessels which are not enrolled or licensed as therein provided navigating on the navigable waters of the United States. And no vessel can be enrolled unless it be owned by a citizen or citizens of the United States or a corporation created under the laws of any of the States thereof. (Section 8058, U. S. Comp. Stat.)

A seeming exception to this provision is incorporated in section 8062 which authorizes the enrollment of "any steam boat employed or intended to be employed only in a river or bay of the United States, owned wholly or in part by an alien resident within the United States * * * as if the same belonged to a citizen of the United States * * *" on giving a bond "conditioned that the boat shall not be employed in other waters than the rivers and bays of the United States." (Sections 8062, 3.)

It appears that the provisions of title 50 do not operate to require the enrollment of canal boats which are employed on the internal waters or canals of the State (and not "employed in trade with the Canadas") which are not propelled by sail or by internal motive power of their own. (Sec. 8145.)

Section 8146 provides that:

"The provisions of title fifty of the Revised Statutes of the United States shall not be so construed as to require the payment of any fee or charge for the enrolling or licensing of vessels *built in the United States and owned by citizens thereof*, not propelled by sail or by internal motive power of their own and not in any case carrying passengers, whether navigating the internal waters of a state or the navigable waters of the United States, and not engaged in trade with contiguous foreign territory, nor shall this or any existing law be construed to require the enrolling, registering or licensing of any flat boat, barge or like craft, for the carriage of freight, not propelled by sail or by internal motive power of its own, on the rivers or lakes of the United States."

But this provision is held to relate solely to vessels "built within the United States and owned by citizens thereof" and not to extend to foreign craft, even when owned by an American citizen. (Vol. 16, Opinions of Attorney General, U. S., p. 563.)

I am persuaded that these provisions do not operate to authorize the navigation upon the navigable waters of the United States of canal boats which are not owned by a citizen of the United States. The clear policy and purpose of the Federal legislation, as I read it, is to the contrary, namely, that no freight carrying vessels may be navigated upon the navigable waters of the United States except as they are authorized so to do by the provisions of title 50.

I find no such provision relating to canal or tug boats owned by Canadians or built in Canada.

As a result of a rather hasty examination of this congressional legislation I am inclined to the belief that canal boats built in Canada or owned by Canadians may not be lawfully navigated upon the canals or canalized rivers of the State of New York.

If my understanding of the law is correct, it is incumbent upon the Secretary of Commerce, who is charged with the duty of enforcing the provisions of these Federal regulations, to take steps to prevent the continued operation of this character of craft on the canals of this State. I would suggest that the committee representing the owners of boats operating on the Barge Canal, which has communicated with you, communicate to the Secretary of Commerce a full and precise statement of the facts, including

the names of the boats, the operation of which is complained of, and the owners thereof, with a request that he take steps to prevent their continued operation.

I will be pleased to render to it any assistance within my power, but I think that orderly practice requires that the matter be first taken up with the Federal authorities.

March 28, 1921.

CHARLES D. NEWTON,
Attorney-General.

To HON CHARLES L. CADLE,
Superintendent of Public Works.

On April 5, 1921 the Attorney-General issued the following memorandum as a supplement to the foregoing opinion:

From a conversation had with your Chief Clerk, Alfred M. O'Neill, I learn that my letter of the 28th ult. with respect to Canadian canal boats navigating the Barge Canal has been construed to mean that Canadian built canal boats or tugs could under no circumstances navigate the canals or internal waters of this State, and specifically that they could not lawfully carry cargo from a point in the State of New York over the canal and connecting waters to Montreal or other Canadian ports. I did not intend to be so understood.

It was my understanding that the practice complained of was the employment of canal boats or tugs built in Canada or owned by Canadians to carry cargo *from one point or place to another on the Barge Canal*; and I intended to express the opinion that this was forbidden by the Federal statutes to which I referred.

I am not aware of any congressional legislation forbidding the employment of such boats on the canals or internal waters of this State in carrying cargo *from a New York to a Canadian port or vice versa*, provided they do not undertake to carry from one point or place to another within this State, and accordingly am of the opinion that such use on the canals or interior waters of the State of Canadian built or owned canal boats would be lawful. I regret that the unguarded general language employed in my former communication has led to this misunderstanding.

CHARLES D. NEWTON.
Attorney-General.

IMPROVED HIGHWAYS — SECTION 6, FIRST FIFTY-MILLION DOLLAR REFERENDUM ACT FOR THE CONSTRUCTION OF HIGHWAYS — CHAPTER 459 OF THE LAWS OF 1919, CHAPTER 18 OF THE LAWS OF 1921.

The legislature has no power to modify the specific provisions of a referendum act.

A communication of recent date sets forth a certified copy of a resolution passed by the board of supervisors of Steuben county, pertaining to the Corning-Hornby County Highway No. 1475. It appears that the contract for this road was duly awarded by State Commissioner of Highways Edwin Duffey to the Atlanta Construction Company on December 7, 1916; that the contract was terminated as a war contract under the provisions of chapter 459 of the Laws of 1919, known as the "Knight Act"; that the 1921 Legislature, by chapter 18, amended the Highway Law (section 120) in relation to the designation of State and county highways to be constructed and maintained by the State and to approve a map upon which such road is designated. This act does not contain the highway in question.

The board of supervisors of Steuben county contend that notwithstanding the passage of chapter 18 of the Laws of 1921 (the Hewitt Act), it is the duty of the Commissioner of Highways to proceed to readvertise and relet the contract for the construction of said Corning-Hornby County Highway No. 1475. You desire to know whether the contention of the board of supervisors is correct.

The highway in question was originally awarded for construction from moneys arising out of the sale of bonds under the Fifty Million Dollar Referendum Act. This is a county highway and section 6 of such Referendum Act provides as follows:

"The routes of county highways to be constructed and improved hereunder are such as shall be determined by the state commission of highways with the approval of the boards of supervisors of the respective counties as set forth and prescribed by the highway law."

It appears that the highway in question was determined to be constructed and improved by the State Commissioner of Highways and that the approval of the board of supervisors of Steuben county was had and that all of the preliminary requirements for the construction of this highway were performed and complied with. The contract was duly awarded to the Atlanta Construction Company in 1916 and I am informed that certain bridges which were necessary for such proposed highway were duly constructed by the town. By reason of the economic conditions

prevailing at the time the contract was awarded, little if any work was done by the contractor. Therefore, in the year of 1919 the contract was terminated by the Commission of Highways pursuant to the "Knight Act." Section 5 of said "Knight Act" provides as follows:

"A contract terminated as provided in this act *shall* be completed under the direction and supervision of the State Commissioner of Highways by a contract awarded after competitive bidding as provided in the highway law and the advertisement for proposals, receipts of bids, award and execution of such contract, and the conduct of the work thereunder and acceptance thereof by the commission shall be in accordance with, and governed by the provisions of, the highway law which may be applicable thereto."

It, therefore, appears that, by section 5 of the "Knight Act," it is mandatory upon the Commissioner of Highways to complete any contract terminated thereunder, and to enable the Commission to accomplish the completion of such terminated contract by section 8 of the "Knight Act" there was appropriated the sum of three million dollars (\$3,000,000) or so much thereof as might be necessary to pay the State's share of the excess cost of the completion of the work in any such contract.

Chapter 18 of the Laws of 1921 in nowise repeals the provisions of chapter 459 of the Laws of 1919 and it still remains the duty of the Highway Commission, notwithstanding the enactment of chapter 18 of the Laws of 1921, to complete any and all highway contracts terminated under the provisions of the "Knight Act." Further, the Hewitt Act, or chapter 18 of the Laws of 1921, cannot modify the provisions of the Referendum Act in relation to the construction of State and county highways, and the road in question certainly comes within the provisions of section 6 of the Referendum Act.

I am, therefore, of the opinion that it is the duty of the State Commission of Highways to proceed under the provisions of chapter 459 of the Laws of 1919 to award the contract for the road in question and complete the same, notwithstanding the fact that said highway is omitted from the list of highways designated for construction under chapter 18 of the Laws of 1921.

March 28, 1921.

CHARLES D. NEWTON,
Attorney-General.

To HERBERT S. Sisson, *State Commissioner of Highways.*

VILLAGE LAW, SECTION 90, SUBDIVISION 30 — KEEPING OF CALVES.

Power to regulate the keeping of calves does not authorize the absolute prohibition.

Your letter of the 24th inst., enclosing copy of proposed ordinance, in relation to the keeping of calves in said village over night, received.

By section 90, subdivision 30 of the General Village Law, the board of trustees of a village is given power to enact ordinances "to regulate the keeping of calves within the village limits." To regulate is to govern by or subject to certain rules or restrictions. It implies a power of restriction and restraint within certain reasonable limits. As a general rule power conferred simply "to regulate" does not authorize the absolute prohibition of the subject matter upon which the authority is to be exercised; much depends upon the nature of the subject matter as to the scope of the power.

It seems to me significant that the Legislature in conferring power upon the trustees in relation to calves has simply conferred the power "to regulate," while in the preceding subdivision in relation to swine, has conferred both the power "to regulate" and the power "to prohibit," and for that reason I am inclined to the view that the power "to regulate" the keeping of calves does not authorize the absolute prohibition.

The proposed ordinance, of course, does not forbid the keeping of calves within the limits of the village, but refers only to the keeping of calves for a considerable portion of the night for shipping purposes. The ordinance on its face does not appeal to me as being a reasonable one. Whether or not it is reasonable depends upon the particular facts and circumstances and the evils connected therewith which it is desired to correct.

The local authorities are in a position to determine whether the proposed order is a reasonable exercise of their power "to regulate" the keeping of calves, and for that reason I neither condemn nor approve the proposed ordinance, but merely present the above views which I trust may be of some assistance to you.

March 29, 1921.

CHARLES D. NEWTON,
Attorney-General.

To J. W. CORNAIRE, *Cape Vincent, N. Y.*

SAVINGS BANKS INVESTMENTS — BANKING LAW, SECTION 239.

There was no default by the State of Missouri in the non-payment of "War Claim Certificates," and accordingly bonds of the cities of that State are not for that reason illegal investments for savings banks in New York.

I have read over carefully the explanation for the nonpayment of "War Claim Certificates" of the State of Missouri contained in a letter of March 7, 1921 from John P. Gordon, State Auditor of Missouri, a copy of which is attached to your communication to us of March 17, 1921, upon examining the Missouri statute approved March 19, 1874, and entitled "An act to audit and adjust the war debt of the State," and the subsequent constitutional provision of that State (art. IV, § 52) I am of the opinion that there has been in this particular no default such as would make bonds of cities in that State illegal for investment for savings banks in this State.

The statute referred to and the certificates issued under it provide that the certificates are not payable and that the State of Missouri is not responsible for their payment provided the government of the United States does not first allow and pay to the State of Missouri the claims allowed under the act. The constitutional provision adopted in 1875 denies the General Assembly power to appropriate any money or issue bonds for the payment of the claims audited under the act of 1874 until after the claims so audited have been paid by the government of the United States to the State of Missouri.

It results that the faith and credit of the State of Missouri has never as yet been pledged for the government of the United States has so far refused to pay the claims.

I have not been informed whether there are any recent amendments to the constitution or the statutes of Missouri which affect the situation.

March 29, 1921.

CHARLES D. NEWTON,
Attorney-General.

To GEORGE V. Mc LAUGHLIN,
State Supt. of Banks.

GENERAL HIGHWAY LAW, SECTION 282, SUBDIVISION 6 — LICENSE FEES.

The Secretary of State should not register motor vehicles without payment of a license fee unless said vehicles are controlled by the municipality.

Leonard B. Walker, Bureau of Weights and Measures, Steuben county, state that he furnishes, as sealer of weights and measures, a truck and a touring car which is used practically the whole time in connection with the performance of the duties of his office; that the county pays for the gasoline, oil and repairs and for the garage rent for the storing of cars but allows him no compensation for the use. You ask for my opinion as to whether this truck and touring car should be registered by you without fee.

Section 282, subd. 6 of the Highway Law provides for the fees to be paid for registering motor vehicles. This subdivision contains the following:

"The provisions hereof with respect to the payment of registration fee shall not apply to motor vehicles owned or controlled by the state, a city, a county, village or town or any of the departments thereof, but in other respects shall be applicable."

The question to be determined is as to whether the cars owned by Mr. Walker and used as set forth in the above statement of facts can be said to be "controlled" by the county so as to bring them within the exemption contained in subd. 6 of section 282 of the Highway Law.

The phrase "to control" means to exercise a restraining or a directing power over. Can it be said that the county authorities exercise such power over the cars owned by Mr. Walker? I think not. The cars are controlled entirely by Mr. Walker. He can devote them at any time to his own use. The fact that he does use them most of the time in connection with his official duties does not take them out of his personal control.

It seems to me that to hold that the cars owned by Mr. Walker and used in the manner above stated were controlled by the county would do violence to the language used and the spirit and purpose of the statute.

I, therefore, advise you that in my opinion you should not register these motor vehicles without the payment of the statutory fee.

March 30, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO JOHN J LYONS,
Secretary of State.

SAVINGS BANK INVESTMENTS — BANKING LAW, SECTION 239, SUBDIVISION 5-B.

West Virginia has not defaulted on the payment of a debt authorized by its legislature and bonds of cities in that State are legal as investments for savings banks if they otherwise fulfill the requirements of our Banking Law.

Your letter inquires as to the legality of bonds of cities in West Virginia as investments for savings banks in this State in view of the judgment of the United States Supreme Court in 1915, which was not complied with by West Virginia until 1919.

By that judgment the long litigation between the two states, appearing so many times in the United States Supreme Court, over West Virginia's liability for one-third of the debt of Virginia, was closed and West Virginia was directed to pay to the State of Virginia \$14,562,867.16 (238 U. S. 202; 246 U. S. 565) to meet West Virginia's portion of the old Virginia debt which had been funded into what were known as "Virginia Deferred Certificates." By the act of West Virginia passed in 1919 (chap. 10, Extraordinary Session) bonds of that State payable at the expiration of twenty years were authorized, \$12,366,500 to be delivered to the State of Virginia to take up Virginia Deferred Certificates on deposit with the State of Virginia and \$1,133,500 to be held in escrow in order to exchange the same for Virginia Deferred Certificates not deposited with the State of Virginia. I understand there has been no default in the payment of interest on these bonds since their issue, and as subdivisions 5-b of section 239 of the Banking Law refers only to a default in the payment of a debt "authorized by the Legislature of any such State", and not to a default to pay a judgment, I am of the opinion that West Virginia has not in this respect failed to comply with the terms of our Banking Law.

April 1, 1921.

CHARLES D. NEWTON,
Attorney-General.

To GEORGE V. MC LAUGHLIN,
State Supt. of Banks.

REVOCABLE PERMITS AUTHORIZING THE USE OF CANAL LANDS MAY BE ISSUED BY THE SUPERINTENDENT OF PUBLIC WORKS UNDER CERTAIN CIRCUMSTANCES.

The Superintendent of Public Works possesses the power, by a strictly revocable permit, to authorize the use, under the circumstances herein disclosed, of canal lands, other than terminal lands.

An opinion was requested as to whether the Superintendent of Public Works was authorized, as a matter of law, to issue to

the Erie Barge Freight Terminal Company, Inc., of Buffalo, a permit in substantially the form of the former permit issued to George W. Maltby & Sons Co. I am of the opinion that the Superintendent of Public Works is possessed of the power to grant, under proper restrictions and conditions, strictly revocable permits for the use of canal lands, other than terminal lands, provided that the use to be made thereof under the permit will in no wise interfere with the free and perfect use of the canals. Such permits do not, in my opinion, constitute a sale, lease or disposal of canal lands in contravention of the provisions of section 8, article VII of the Constitution, inasmuch as they invest the permittee with no interest or estate in the canal lands.

The fact that specific provision is made by section 35 of the Canal Law for the granting of revocable permits to railroad corporations to construct tracks on or over canal lands does not, I think, negative the existence of this power, which has been repeatedly exercised, without challenge, for many years, to grant such permits to other persons for the construction of railroad tracks or for other purposes.

Of course, the Superintendent of Public Works possesses no power to authorize the occupancy or use of any State lands other than canal lands. If any part of the lands covered by such a permit are not canal lands, the permit is to that extent ineffective. I have no means of knowing whether the lands to which the proposed permit relates are in fact canal lands. I assume that you can readily solve that question.

The point is raised by certain parties objecting to the issuance of the proposed permit that it is incumbent upon the applicant, before constructing its proposed track, to obtain permission so to do from the Public Service Commission. Assuming such to be the fact, and that such authorization has not as yet been obtained, that does not, as I view the matter, divest you of power to grant the permit. The Public Service Commission might well take the same position, namely, that it would not pass upon the application until authority to construct the track was obtained from the Superintendent of Public Works. It simply amounts to this — that if the permit is granted and the Public Service Commission withholds its consent the permit will be ineffective.

I find no defect in the form of the permit issued to George W. Maltby & Sons Co., dated March 3, 1920, which is submitted to me. Assuming that the Superintendent possesses the power to issue the permit, I see no reason why he may not stipulate as provided for in the eighth paragraph thereof.

In writing the foregoing I do not intend to express any opinion with respect to the merits of the application or as to whether you should exercise your discretion by granting the requested permit.

As I heretofore pointed out, this question as to the power of the Superintendent of Public Works to grant revocable permits authorizing the use of canal land is a constantly recurring one. I have concluded that he possesses the power so to do. However, I feel that the question is not altogether free from doubt; and, as I have heretofore stated, I feel that it would be more satisfactory if the Legislature would confer upon the Superintendent, acting alone or in conjunction with the Canal Board, power so to do in clear and express terms. I advise the introduction of a bill to this effect.

April 2, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO HON. CHARLES L. CADLE, *Superintendent of Public Works.*

SCHOOL BONDS — INTEREST.

School authorities have no power to issue bonds bearing a greater rate of interest than specified in the proposition.

You ask for my opinion on the following question:

“Can a School Board issue bonds at the rate of $5\frac{3}{4}$ per cent interest, for the purpose of building a new school building when the proposition voted upon to build this new school building definitely stated that the bonds therefor should be issued at a rate of interest not exceeding 5 per cent?”

It seems to me this question should be answered in the negative.

While the provisions of the Education Law do not provide the form and contents of a proposition for the raising of school moneys, nevertheless the proposition submitted did contain a condition that the bonds should only bear interest at the rate of 5 per cent per annum. This proposition is the authority given to the officers and they are only empowered to act according to its terms. The taxpayers of the school district have consented to the issuance of bonds bearing interest at 5 per cent and they have never consented to the issuance of bonds bearing a higher rate of interest. The condition in the proposition that the bond should bear interest at the rate of 5 per cent only is a vital part of the proposition and the authorities have no power to change, alter, waive or disregard the terms and conditions imposed.

Doubtless the school authorities would have power to provide that the bonds should pay 6 per cent as provided in the statute, if no mention had been made in the proposition submitted as to the rate of interest. However, having presented to the taxpayers a specific proposition as to the rate of interest the bonds should bear, I believe they are bound to follow and obey the mandate of the taxpayers.

April 2, 1921.

CHARLES D. NEWTON,
Attorney-General.

To HOMER D. OWENS, *Bainbridge, N. Y.*

ISSUANCE OF FUNDS BY THE STATE COMPTROLLER — SECTION 4, ARTICLE 7 OF THE STATE CONSTITUTION AS AMENDED NOVEMBER 2, 1920, SECTION 5, ARTICLE 7 OF THE STATE CONSTITUTION.

All bonds issued by the State Comptroller subsequent to January 1, 1921, must be serial bonds.

Request is made for a construction of section 4, article 7 of the Constitution, as amended by the people at the election held November 2, 1920, in so far as said amendment relates to the class of bonds to be sold by the State after the taking effect of such amendment, namely, January 1, 1921.

The amendment reads as follows:

“Except the debt specified in sections two and three of this article, all debts contracted by the State after January first, 1920, pursuant to an authorization therefor, heretofore or hereafter made, and each portion of any such debt from time to time so contracted irrespective of the terms of such authorization, shall be paid in equal annual instalments, the first of which shall be payable not more than one year, and the last of which shall be payable not more than fifty years after such debt or portion thereof shall have been contracted. No such debt hereafter authorized shall be contracted for a period longer than that of the probable life of the work or object for which the debt is to be contracted, to be determined by general laws, which determination shall be conclusive.”

I am advised that there are to be issued by you bonds in the sum of \$38,800,000 for highway, barge canal terminals, and acquisition of lands for State park purposes. The issuance of these bonds was authorized prior to January 1, 1921, under various referendum acts.

QUERY.

Shall the \$31,800,000 bonds remaining unsold at this time be issued in accordance with the terms of the original acts, or shall they be issued as serial bonds pursuant to the amendment above quoted?

The amendment provides that all acts contracted by the State after January 1, 1920, except the debts specified in sections two and three of article 7, shall be paid in equal annual instalments; the first to become due not more than one year from the date of issue and the last not more than fifty years, and further, that no debt *hereafter* authorized shall be contracted for a period longer than that of the possible life of the work or object for which the debt is to be contracted. The Legislature by general laws shall determine the possible life of the work or object, and such determination shall be conclusive.

The amendment further directs that all debts contracted (which would be the sale of bonds) after the date specified in such amendment, shall be paid by serial bonds as above set forth—the first to run for a no greater period than one year and the last for fifty years “*pursuant to an authorization therefor, heretofore or hereafter made, and each portion of any such debt from time to time so contracted irrespective of the terms of such authorization shall be paid in equal annual instalments.*”

This amendment to section 4 of article 7 of the Constitution specifically repeals the terms of any authorization for the issuance of bonds contained in any referendum heretofore enacted by the people, it being the intent that all bonds issued by the State after January 1, 1921, shall be serial bonds for the duration as specifically set forth in the amendment above referred to. This is made clear by a reference to the following amendment to section 5 of article 7 as follows:

“The Legislature may also by general laws provide means and authority whereby outstanding bonds of the State, for which sinking funds are provided, may be exchanged at par for cancellation, for serial bonds of the form authorized under section four of this article, upon such terms and conditions as to interest and otherwise as it may in its discretion authorize and determine, except that the debt as thus refunded shall finally mature no later and at no greater comparative cost to the state than the original debt; the determination of the Legislature as to such comparative cost shall be con-

clusive. No further contributions to the respective sinking funds shall be made on account of bonds so exchanged and the proportion of any such sinking funds, which the amount of the bonds so exchanged shall bear to the amount of bonds outstanding of the same issue may be appropriated, as required, for the payment of the substituted serial bonds."

the idea being to make all bonds issued from January 1, 1921, serial bonds, and under section 5 to convert as many as possible of the long-term bonds into serial bonds.

I am, therefore, of the opinion that the \$31,800,000 bonds remaining unsold from authorization prior to January 1, 1921, must be issued as serial bonds, pursuant to the amended section 4 of article 7 of the Constitution.

April 7, 1921.

CHARLES D. NEWTON,
Attorney-General.

To JAMES A. WENDELL, *State Comptroller.*

VILLAGE LAW, SECTION 42 — VOLUNTEER FIREMEN.

A member of a volunteer fire company is not a village officer and therefore is not prohibited by section 42 of the Village Law from holding any other village office. Trustee of the public library may also hold any village office.

We have your letter of the 4th instant, in which you ask for my opinion upon two questions submitted concerning volunteer firemen and trustees of a public library.

Answering your first inquiry as to whether a member of a volunteer fire company of an incorporated village is a village officer, within the meaning of section 42 of the Village Law, so as to disqualify him from holding any other village office, I beg to advise you that in my opinion a member of a volunteer fire company is not a village officer. Members of police and fire departments are employees and not officers, and the fact that they are volunteers and receive no compensation for their services would not make them public officers. I am of the opinion that the prohibition contained in section 42 would not disqualify such firemen from holding the other village offices enumerated in your inquiry, nor do I perceive any incompatibility between the duties of such firemen and the offices enumerated.

In reply to your second inquiry as to whether a person can hold simultaneously both the offices of water commissioner and public library trustees, I beg to advise you that in my opinion a person can hold two such offices.

I do not believe that a trustee of a public library established pursuant to the provisions of the Education Law is a village officer within the meaning of section 42 of the Village Law. Such officer is nowhere listed as an officer of the village. Provision for his election or appointment and his powers and duties are all provided for in the Education Law.

In the absence of any statute making such library trustee a village officer, I am inclined to the view that he is not, strictly speaking, a village officer, and for that reason the prohibition contained in section 42 of the Village Law does not apply. Furthermore the duties devolving upon a water commissioner and a library trustee are not incompatible. For these reasons it seems to me that one person can simultaneously hold the offices of water commissioner and public library trustee.

April 7, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO CHARLES C. FLAESCH, *Unadilla, N. Y.*

VILLAGE BONDS — CHANGE OF DATE OF ISSUE OR MATURITY.

Village authorities have no power to change the date of issue or the date of maturity of village bonds without the adoption of a new proposition.

It is stated that the village has been authorized to issue bonds in the sum of \$15,000, bearing interest at five per cent, said bonds to bear date July 1, 1920, and one shall fall due each year commencing July 1, 1921. You further state that the village was unable to sell the bonds last year and you inquire if the bonds may be issued bearing date July 1, 1921, instead of July 1, 1920, and have them commence maturing in 1922 instead of 1921, or must a new proposition be submitted.

I am of the opinion that you have no authority to change the date of the issue of the bonds or their date of maturity without the adoption of a new proposition. However, I see no objection to now selling the bonds bearing date July 1, 1920.

Bonds, however, must not be sold for less than par, which means if they are disposed of after their date, their par value is the sum of the principal and the accrued interest.

April 11, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO ALBERT M. VAN DENBURG, *Dolgeville, N. Y.*

SAVINGS BANK INVESTMENT—BANKING LAW, SECTION 238, SUBDIVISION 3.
GEORGIA CONSTITUTION, ARTICLE VII, SECTION 111—LAWS OF GEORGIA,
ACT No. 139 OF 1915.

Common School Warrants of the State of Georgia are not legal investments for savings banks in New York State.

Hon. Hugh M. Dorsey, Governor of the State of Georgia, has requested an opinion regarding the legality for investment by savings banks in this State of common school warrants issued by the Governor and sold at a discount.

These warrants are issued pursuant to Act No. 139 of the Laws of Georgia for 1915, which provides:

“Section 1. Be it enacted by the General Assembly of Georgia, and it is hereby enacted by authority of the same, That, for the purpose of anticipating collection of the taxes of the current year, the Governor shall be and he is hereby authorized to draw his warrant, at the end of each and every month during the current year, in favor of the State School Superintendent or of the several county school superintendents and treasurers of local school systems, in the discretion of the State Board of Education, for such amount or amounts as are then due the teachers, said warrants shall be drawn on the funds appropriated by the Legislature for the current year, and shall not exceed in the aggregate amount the appropriation for the public schools so made for that year. The *honor* of the State is hereby pledged to the payment thereof.

Section 2. Be it further enacted by the authority aforesaid, That it shall be lawful to sell at a discount said warrants to any person, bank, or banking institution, the said sale to be made at the lowest possible rate of discount.”

The appropriation made by the General Assembly of Georgia for public schools during 1921 is \$4,500,000. (P. 11, Georgia Laws 1919.)

It is first inquired whether these school warrants are "interest bearing obligations" of the State of Georgia within the meaning of section 239, subdivision 3 of our Banking Law, which authorizes the investment of savings bank funds in "the stocks, bonds or interest bearing obligations of any State of the United States." Without disposing of this question, and entering at once upon your second question of more importance, I find that the warrants have not behind them the faith and *credit* of the State of Georgia, and are therefore not legal for investment by our savings banks.

The Constitution of Georgia, article VII, section 111, prohibits the contraction of any debt by or on behalf of the State excepting a floating indebtedness of not to exceed \$500,000 to supply deficiencies in revenue and to be repaid out of taxes levied for the year in which the loan is made:

"Paragraph 1. No debt shall be contracted by or on behalf of the State, except to supply such temporary deficit as may exist in the treasury in any year from necessary delay in collecting the taxes of that year, to repel invasion, suppress insurrection, and defend the State in time of war, or to pay the existing public debt; but the debt created to supply deficiencies in revenue shall not exceed in the aggregate, Five Hundred Thousand Dollars, and any loan made for this purpose shall be repaid out of the taxes levied for the year in which the loan is made."

While I am not informed whether the current indebtedness of the State will by the sale of these warrants at any time exceed \$500,000, I believe that the General Assembly, in view of this constitutional provision, did not intend to put the credit of the State behind the warrants, for only the *honor* of the State was pledged. (Act of 1915.) If these warrants are not considered by the government of Georgia as debts of the State of Georgia under its Constitution, they are in no respect financial obligations of that State within the spirit of section 239 of our Banking Law, and savings banks here cannot take them for investment.

April 18, 1921.

CHARLES D. NEWTON,
Attorney-General.

To GEORGE V. McLAUGHLIN, *State Superintendent of Banks.*

VILLAGE LAW, SECTION 89, SUBDIVISION 23—DUMPING GROUNDS.

The village has no power to purchase lands outside of the corporate limits of the village to be used as a public dumping ground.

Many village authorities have power to purchase lands outside the corporate limits to be used as a public dumping ground is the question here involved.

Subdivision 23 of section 89 of the Village Law confers power upon the board of trustees to purchase or acquire by condemnation proceedings lands for the establishment of a public dump or dumping ground in any such village.

This subdivision has recently been construed in the case of *Gibson v. The Village of Messina* (109 Misc., p. 505), wherein Judge Whitmyer held that this section only authorized the purchase of lands "in the village" for the establishment of a public dump, and the power to purchase outside the village for that purpose could not be implied.

I do not find that this decision was ever appealed from, and, therefore, must be considered the law in the case.

April 19, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO WILSON R. YARD, *Pleasantville, N. Y.*

RIGHT OF OWNERS OF RIPARIAN LAND ON NAVIGABLE LAKES OR STREAMS TO WHARF OUT, ETC.

The owner of upland on navigable water possesses the right to construct wharves or piers to enable him to gain access to the navigable portion thereof; also to make use of the waters of the stream for boating and fishing.

The general rule is that the owner of upland on navigable lakes or streams possesses, as an incident to his upland property, the right to construct docks or piers extending from his upland to the navigable portion of the waters upon which his upland fronts and to make use of such waters for boating and fishing. Assuming that the lake to which reference is made is a navigable water, I am of the opinion that riparian owners on the same possess the right to utilize the same both for boating and fishing. However, I cannot advise you decisively without more definite information as to the physical situation. The owner of property fronting upon a lake or stream possesses, as an incident to his ownership of the upland, the right to take a reasonable quantity of the water from

the lake or stream and make use of it on his property for ordinary, reasonable household purposes.

April 22, 1921.

CHARLES D. NEWTON,
Attorney-General.

To M. G. BARNES, *Monroe, N. Y.*

TOWN LAW, SECTION 81 — PUBLIC OFFICERS LAW, SECTION 30 — RESIDENTS.

Only resident electors of towns entitled to hold office. If a justice of the peace moves from the town in which he was elected, a vacancy is created.

You inquire if a justice of the peace vacates his office by moving into another town.

Section 81 of the Town Law respecting the eligibility of town officers provides that

“Every elector of the town shall be eligible to any town office * * *.”

As this section makes only the electors of a town eligible to a town office, they must be residents of the town.

Section 30 of the Public Officers Law provides that

“Every office shall be vacant upon the happening of either of the following events before the expiration of the term thereof:

* * * * *

“4. His ceasing to be an inhabitant of the state, or if he be a local officer, of the political subdivision, or municipal corporation of which he is required to be a resident when chosen; * * *”

Therefore, it seems clear that if a justice of the peace moves from the town in which he was elected to serve, a vacancy is created in that office, pursuant to section 30 of the Public Officers Law.

April 27, 1921.

CHARLES D. NEWTON,
Attorney-General.

To JAMES M. REED, *Orchard Park, N. Y.*

INSURANCE LAW, SECTION 100 — BONDS AS INVESTMENTS — JOINT 4'S OF THE GREAT NORTHERN AND OF THE NORTHERN PACIFIC RAILWAY COMPANIES.

Insurance companies may convert Joint 4's of the Great Northern and of The Northern Pacific Railway Companies for Joint 6 1-2's.

The Superintendent of Insurance has submitted a file of correspondence from which and from a conference with those interested I derive the following statement of facts. This statement has been partly verified by your investigators and is further subject to your check under the provisions of the statute I am asked to construe.

It is made to appear that prior to March 1, 1906, life insurance companies of New York acquired at least \$21,000,000 of bonds known as the Joint 4's of the Great Northern and of the Northern Pacific Railway Companies issued in 1901 and maturing on July 1, 1921. The entire issue of \$215,227,000 was secured by pledge of 1,076,135 shares of C. B. & Q. R. R. which have been increased to 1,658,674 shares by a stock dividend. The condition of the market is such that it is improbable the obligation can be met when due and the companies' representatives also declare that an extension of the Joint 4's is impracticable. Accordingly there has been submitted to the Interstate Commerce Commission and approved the following plan of financing: 25 year Joint 6 1-2's for \$230,000,000, dated July 1, 1921, will be issued secured by the same stock collateral. Although there will be an increase of approximately \$15,000,000 in principal sum there will be additional collateral of \$66,000,000 pledged, consisting of \$33,000,000 of Refunding and Improvement Bonds Series B of the Northern Pacific Railway Company due in 2047 and \$33,000,000 General Mortgage 7's Series A of the Great Northern due in 1936. Holders of the new Joint 6 1-2's will have the right to convert into these two issues, pledged as additional collateral to the extent of \$115,000,000 each respectively.

In view of the large amount of Joint 4's held by our insurance companies, the Superintendent of Insurance is asked whether or not he will approve an exchange by the companies under his supervision of the Joint 4's for the new Joint 6 1-2's. He in turn requests my opinion as to whether or not under section 100 of the Insurance Law he has any authority to approve the exchange. If he has not, the insurance companies will have to dispose of their holdings in a disadvantageous market, instead of accepting what appear to be securities as good or better than those now held.

Under section 100 of the Insurance Law, domestic life insurance companies may not now invest in bonds where more than one-third of the total of the security consists of shares of stock; an

exception is made, however, where bonds so secured were acquired prior to March 1, 1906. This is how the Joint 4's were acquired and held. The section then carries a proviso which in its part important here is:

" Provided, however, that nothing in this section contained shall be construed as prohibiting a life insurance company from entering into an agreement for the purpose of protecting the interests of the company in securities lawfully held by it, or * * * "

The power to enter into any agreement to protect security now lawfully held, as are the Joint 4's, is almost as broad as could be given. It is subject only to the check that the Superintendent must give his approval in writing to the agreement.

My attention is, of course, directed solely to a construction of the statute. It is my opinion that under the proviso permitting an agreement for the purpose of protecting their interests, the life insurance companies may make this exchange of bonds.

It is the purpose of the statute and the policy of the law generally to favor the continuance of that which has been lawful heretofore, except where a prohibition is expressed. Nothing appears in this proposed transaction to indicate that anything more than a preservation of the *status quo* as it existed prior to March 1, 1906, will be accomplished.

I return herewith the correspondence submitted.

April 27, 1921.

CHARLES D. NEWTON,
Attorney-General.

To JESSE S PHILLIPS,
State Supt. of Insurance.

BANKING LAW — BONDS OF THE CITY OF COVINGTON, KENTUCKY.

Bonds of the city of Covington, Kentucky, are still legal investments for savings banks.

Bonds of the city of Covington, Kentucky, are in my opinion still legal investments for saving banks in New York.

The Superintendent of Banking has heretofore recognized these bonds as legal investments; but he now makes inquiry as to whether or not the bonds of this municipality should not be removed from his list of approved securities, in view of the action of that municipality in refusing to meet in full the obligation of certain bonds known as the Randall Avenue Improvement Bonds.

The question to be determined is whether or not there was a repudiation or a default by the city, bringing all its stocks and bonds within the general condemnation of section 239, sub. 5 of the Banking Law.

The Court of Appeals of Kentucky in the case of *German National Bank of Covington v. City of Covington*, 164 Ky. 292 (decided April 23, 1915), has held that the faith and credit of the city was not lawfully pledged under the statutes of Kentucky.

This adjudication does not, however, bind or protect the officers of this State, since the interpretation of local statutes for the purpose of determining the existence of a contract is not left finally to the court of last resort of the State concerned. In the absence of a decision by a Federal court of competent jurisdiction, a proper caution required that I re-examine the basis of the decision.

For this purpose I am deeply indebted to Hon. A. E. Stricklett, Solicitor of the city of Covington, for conferences and memoranda covering the case.

After careful study, I am convinced that the Randall Avenue Bonds were not issued on a pledge of the general faith and credit of the city and that there has, therefore, been no repudiation or default.

In my opinion the Superintendent of Banking may, as heretofore, still regard the bonds of the city of Covington as legal investments for savings banks.

April 29, 1921.

CHARLES D. NEWTON,
Attorney-General.

To GEORGE V. MC LAUGHLIN,
State Supt. of Banks.

BANKING LAW, SECTION 230 — SAVINGS BANKS — BOARD OF DIRECTORS.

The execution of notice of intention and of execution of certificate of incorporation and time of submission.

Under section 230 of the Banking Law, not less than nine or more than thirty persons may form a corporation to be known as a savings bank. Deputy Overocker, of your Department, has supplemented the facts given in your letter by an oral statement that in the case presented, sixteen persons undertook to form such a corporation. Under section 231 of the statute the organizers are bound to sign, file and publish a notice of their intention. All sixteen complied therewith. Under section 232 of the law, the

organization certificate "executed in duplicate" must be submitted to the Superintendent of Banking. After his approval thereof corporate existence begins. It appears that in this case one of the parties, who signed the notice of intention, failed to comply with all the essential formalities in executing the organization certificate that is now before you for approval. The person is now in Europe and it will be impossible at present to cure the irregularity.

You ask whether you may give your approval of the certificate despite this defective execution.

In my opinion you may do so. One of the purposes of filing and publishing the notice of intention is to call to the attention of the public, and to yourself, who the proposed incorporators are. If some one who had not signed the notice of intention should now try to become an incorporator, we would, then, have a different case. Here you have more than the minimum number of incorporators required by law and who have done all the law requires. The sixteenth person may be disregarded. He published his intention to become an incorporator, but failed to complete his intent by not executing the certificate of incorporation. It is as if he was unable to continue for various purposes or had died.

You also present another question as follows: Section 232 requires that after the lapse of at least 28 days from the first publication of the notice of intention and within 10 days after the last publication, the certificate of organization must be submitted to you for examination; further, under section 23 of the statute it is provided the Superintendent "*shall* within 60 days after the date of the filing of such certificate for examination" either approve or refuse the certificate. You ask whether or not you may do anything at all if a certificate is not submitted to you within ten days, or in case you neglect it until after 60 days has expired from date of submission.

In my opinion the ten-day period is directory as to you; you may in your discretion receive a certificate after the ten days has expired so long as the extra time allowed is not so unreasonable as to permit the publication to become stale. I think it is clear that there is nothing in the purposes for which publication and filing are required forbidding an acceptance of the certificate upon the 11th or 12th day or during such reasonable time thereafter as will not defeat the purposes of the statute. In my opinion the 60-day period is for the protection of the organizers. After that period they could compel you by judicial process to act. On the other

hand, and consequently from the existence of this right in them, you would not be deprived of all power. Indeed, if you did neglect the certificate for more than 60 days it would be your bounden duty all the more to act.

April 30, 1921.

CHARLES D. NEWTON,
Attorney-General.

To GEORGE V. McLAUGHLIN, *State Superintendent of Banks.*

SAVINGS BANK INVESTMENTS, SECTION 239, SUBDIVISION 3, BANKING LAW.

Tax anticipation bonds of the State of Arizona are not legal investments for savings banks in this State.

Are tax anticipation bonds of the State of Arizona to be issued under authority of a statute of that State dated March 12, 1921, are legal investments for savings banks?

We have your letter enclosing a certified copy of an act approved March 12, 1921, of the State of Arizona, authorizing the issuance of certain bonds in anticipation of taxes. You state that bonds of the State of Arizona have heretofore been held legal investments for savings banks, since no default has occurred. You now ask whether or not these tax anticipation bonds will be likewise legal.

Under section 239, subdivision 3 of the Banking Law "stocks, bonds or interest bearing obligations of any State of the United States" are made legal investments for savings banks. The question presented by your inquiry is whether or not these tax anticipation bonds may be properly called bonds or interest bearing obligations of the State of Arizona.

It is my opinion that they may not since the faith and credit of the State is not pledged. The title of the act itself provides for the issuance of bonds "payable solely from the proceeds of such taxes." Sections 3, 5 and 6 of the act clearly carry out this purpose. It is, therefore, certain that so far as the statute is concerned, the obligations depend for their redemption solely upon the particular taxes in anticipation of which the bonds are issued. My conclusion that such bonds are not legal investments for savings banks is borne out by my opinion rendered to you on April 18, 1921, relative to bonds of the State of Georgia and 1909 Atty. Genl's Rep. 730, 1911 Atty. Genl's Rep. 611, 1913 Atty. Genl's Rep. 629.

In coming to this determination I have had before me only the certified copy of the act in question; it may be there is some general statute or constitutional provision of Arizona which extends

the nature of the obligation or that there are some other circumstances of which I am unaware. I wish it to be understood that if there is any other material which should be submitted to me, I shall be pleased to give the question further examination. I have no doubt, however, of the validity of the position I have taken, based upon the data submitted.

May 11, 1921.

CHARLES D. NEWTON,
Attorney-General.

To GEORGE V. McLAUGHLIN, *State Superintendent of Banks.*

THE PORT AUTHORITY — LEASE OF OFFICE QUARTERS — AUDIT OF EXPENDITURES.

Provisions of section 3 of the Finance Law do not apply to the Port authority in the leasing of office quarters.

The Comptroller possesses no power of audit of claims incurred by it, payable out of the moneys appropriated for its use.

I am in receipt of a letter under date of May 10th, from Julius Henry Cohen, counsel to the Port Authority, enclosing a copy of letter received by him from J. B. Wood of your office, as auditor—finance bureau, in which he raises the questions,—1st, as to whether the provisions of section 3 of the Public Buildings Law apply to the leasing of office quarters for the Port Authority created by a compact entered into between the States of New York and New Jersey, pursuant to the provisions of chapter 154 of the Laws of 1921, and, 2nd,—whether the Comptroller possesses the power of audit of the expenditures of the Port Authority.

(1) Section 3 of the Public Buildings Law provides in substance that the Trustees of Public Buildings shall lease the space or quarters necessary for "the different departments, commissions, boards and officers of the State Government," upon such terms and conditions as the trustees deem most advantageous to the State, purchase furniture, equipment and other personal property for their use, etc.

The Port Authority is not, in my opinion, a department, commission, board or officer of the State government, within the meaning of the statute. It is a "body politic and corporate" composed of the representatives of the States of New York and New Jersey appointed pursuant to the agreement or compact which has been entered into pursuant to the provisions of chapter 154 of the Laws of 1921. It does not come within the letter, nor, as I view the matter, within the spirit of this provision. It would be

incongruous, as I view it, for the Trustees of Public Buildings of the State of New York to rent office quarters for this body politic representing the States of New York and New Jersey. I am of the opinion that the provisions of section 3 of the Public Buildings Law do not apply to the Port Authority.

(2) Chapter 203 of the Laws of 1921, which may be considered a companion bill to chapter 154, Laws of 1921, provides for the appointment of three commissioners to represent the State of New York on the Port Authority. It appropriates the sum of \$100,000 for the expenses of the Port Authority, the Legislature of the State of New Jersey having appropriated an equal amount. It provides that "the moneys hereby appropriated shall be paid out by the State Treasurer on the warrant of the Comptroller *upon vouchers audited by the chairman of the Port Authority.*"

In clear and unequivocal language it provides that claims payable out of the moneys appropriated as aforesaid shall be audited by the chairman of the Port Authority and that when so audited they shall be paid out by the State Treasurer on the warrant of the Comptroller. The Comptroller is given no power of audit by the act; and, in view of the fact that chapter 203 is a special act for a particular purpose and applying to a novel situation, I am persuaded that the general provisions of the State Finance Law may not be extended so as to invest the Comptroller with the power to review the audit by the chairman of the Port Authority, of claims incurred by the Port Authority, payable in whole or in part out of moneys appropriated as aforesaid. (*People ex rel. Heinrich v. Travis*, 175 A. D. 721.)

If it is deemed advisable that such power should be lodged in the Comptroller, it will, in my opinion, be necessary to make suitable provision to that effect in connection with any future appropriations for the Port Authority.

May 12, 1921.

CHARLES D. NEWTON,
Attorney-General.

To JAMES A. WENDELL, *State Comptroller.*

REFERENDUM — RECONSIDERATION.

A majority vote in favor of a proposition is final and decisive and the power of the taxpayers thereunder is exhausted. There can be no reconsideration of such a proposition without legislative authorization.

It appears from the statement of facts presented, that the local board of health, pursuant to section 270 of the charter of the city of Jamestown, recommended to the common council the estab-

lishment of a municipal plant for handling and distributing milk. That after the approval of the report by the common council, the proposition was submitted to the taxpayers and was approved by a majority vote. That subsequently, bids for the purchase of the bonds as authorized were received and the most favorable bid accepted by the council. That the treasurer has been directed to issue the bonds which are about ready for delivery to the purchaser.

You inquire if the common council must resubmit the milk project proposition to the taxpayers, pursuant to a petition filed as provided in section 64-b of the city charter.

The question presented is whether under section 64-b of the charter of the city of Jamestown the Legislature has conferred authority upon the taxpayers to file a petition to resubmit a proposition that has been submitted and carried by a majority vote of the taxpayers.

Sections 270 to 279 of the city charter, which were added by chapter 422 of the Laws of 1914, provide for the establishing of a municipal plant for handling and distributing milk. These sections relate specifically to such a plant, and prescribe a complete scheme for the establishment and operation of such a system.

Assuming that under section 64-b the taxpayers, by petition, could demand a referendum upon the proposition to establish such a municipal plant, it is clear that that section contains no language that could be construed as conferring power upon the taxpayers to demand and compel a resubmission of a proposition, which has been legally submitted and approved by a majority vote. A power granted to initiate by petition the submission of a proposition does not confer power to compel a resubmission of a proposition that has been carried.

It is a well-established principle that where a proposition has been legally submitted to the voters and has been carried by a majority vote that the recommendation submitted thereby acquire the force and effect of law and command that such action shall be carried out by the authorities. The charter of the city of Jamestown so provides. (Section 176.)

A majority vote in favor of the proposition is final and decisive, and the power of the taxpayers thereunder is exhausted. There can be no reconsideration of such a proposition unless the Legislature has authorized such action. Clearly, the Legislature under section 64-b of the city charter has not provided for a reconsideration of a proposition which had received a favorable vote, or the holding of a referendum upon a referendum.

I am of the opinion that section 64-b of the charter of the city of Jamestown does not authorize the filing of a petition demanding a resubmission of a proposition already carried, and, if, such a petition is filed the common council is not authorized to submit the same to a special taxpayers' election.

May 20, 1921.

CHARLES D. NEWTON,
Attorney-General.

To ERNEST CRAWCROFT, *Jamestown, N. Y.*

COMMITMENT OF ALLEGED INSANE PERSONS ON THE SABBATH.

Commitments may be instituted and completed on Sunday when necessary for the preservation of peace, life and property.

We acknowledge a communication enclosing a letter written to the State Hospital Commission under date of April 14th, 1921, by William L. Russell, Medical Superintendent of the Bloomingdale Hospital, White Plains, N. Y., in which inquiry is made as to whether or not the "exercise of the right to commit, and the proceedings necessary therefor, was not an exception to the general statute forbidding judicial acts to be performed on Sunday." It is understood that the entire query relates to the commitment of an alleged insane person to a State hospital for the insane on Sunday.

It is true that section 6 of the Code of Civil Procedure (repealed by the Laws of 1909 and re-enacted in the Judiciary Laws, section 5), formerly and still places certain prohibition upon the acts of all the courts on Sunday. However, the general tenor of the law made and provided under section 5 of the Judiciary Law is to leave ample leeway to care for cases of a kind concerning which those in question are numbered.

Section 5 of the Judiciary Law reads as follows:

"A court shall not be opened, or transact any business on Sunday, except to receive a verdict or discharge a jury. An adjournment of a court on Saturday, unless made after a cause has been committed to a jury, must be to some other day than Sunday. But this section does not prevent the exercise of the jurisdiction of a magistrate, *where it is necessary to preserve the peace*, or in a criminal case, to arrest, commit or discharge a person charged with an offense, or the granting of an injunction order by a justice of the Supreme court when in his judgment it is necessary to prevent irremediable injury or the service of a

summons with or without a complaint if accompanied by an injunction order and an order of such justice permitting service on that day."

It is noted that the magistrate of a court is not prevented from the exercise of jurisdiction where it is necessary to *preserve the peace*, and if the case of an insane person presented from its inception to its conclusion for Sunday action was not one of a violent or emergency nature and thereby calling for the preservation of the peace, including the safety of the alleged insane person and those with whom he is associated, together with the prevention of possible injury to property as well, there would be no occasion for action to be taken in the premises on the Sabbath. This contention appears to be supported under the Common Law decisions in this State.

In passing upon the intention of the Sunday prohibition contained in former section 6 of the Code of Civil Procedure the court said in part in the case of *People ex rel. Price v. Warden, etc.* (73 A. D. 174), at page 176, where Magistrates' Courts in New York City were authorized to exercise their ordinary functions on Sunday under their city charter:

"The purpose of the provision was to 'preserve the peace' and while doing so at the same time to accord to persons, who might otherwise be injured by longer detention, an opportunity to be once heard, and in proper cases set at liberty."

Again, and subsequently passing upon the statutory interpretation of the power of Magistrates' Courts in New York City to exercise their ordinary functions on Sunday, the court said in the case of *People ex rel. Ryan v. Superintendent, etc.*, 149 A. D. 794, at page 797:

"* * * The peace must be preserved on Sunday and so the Magistrate should be on duty. * * *"

It would, therefore, seem that the cases for the commitment of alleged insane persons may be begun and concluded on Sunday where it is necessary for the general preservation of the peace, of life and of property.

May 25, 1921.

CHARLES D. NEWTON,
Attorney-General.

To E. S. ELWOOD, *State Hospital Commission.*

BANKING LAW — SAVINGS BANKS AUTOMATIC TELLERS — INDUSTRIAL BANKING SYSTEM, INC.

A system of collecting savings bank deposits by which an industrial plant becomes the agent of the depositor, does not violate the provisions of the Banking Law against the maintenance of branch offices.

An opinion is asked as to the legality of the industrial banking system for savings banks.

We have had several conferences with Mr. Kline, who represents the Industrial Banking System, Inc., of Milford, Connecticut, and the plan or system which they had previously proposed received some criticism from this Department. We have talked with Mr. Kline again to-day and he has demonstrated to us in detail the working of his system as amended. I will describe it briefly.

An industrial organization, which I will call the plant, goes among its workmen, which I will call the depositors, and collects deposits under the following system:

A savings bank has purchased the system, which is patented, and permits any plant into which the system is introduced, to use the forms. The plant accepts the initial deposit from a workman filling out a signature card. The deposit with the signature card is sent by the plant to the savings bank. The bank then enters rather than credits the initial deposit upon the ledger card made out for the depositor. The bank then issues a special pass book containing coupons, which is sent to the plant with a box of duplicate and original stamps. Then, generally speaking, on pay day an agent of the plant goes among the workmen and asks them, after they have received their wages, whether or not they care to make a deposit. If they make a deposit on original stamp showing the amount is pasted in the pass-book and a duplicate stamp is pasted upon one of the coupons in the pass-book. The coupon with the stamp is then torn out of the book and the amount of the deposit is sent by the plant to the bank. The depositor may then at any time thereafter take his pass-book with the original stamps therein and have the book written up by the bank, at the bank, for the amount shown by the stamps.

Rule 8, printed in the pass-book, requires that the depositor agrees that the plant is his agent and not the agent of the bank.

This is a scheme for the fostering of thrift and we should not search for reasons to condemn it. It is my opinion that the system does not violate section 245 of the Banking Law, restricting the places of business of savings banks. The actual entry

or credit is made at the bank and the plant is only the agent or messenger of the depositor and is not the agent of the bank.

Nor is the scheme tainted with the vice found in the plan condemned by Attorney-General Cunneen in an opinion printed at page 462 of the report for 1903. There a schoolmaster collected money from his pupils and deposited it to the general account of the school in a local bank, and after the amount obtained from an individual pupil had reached \$25, the sum was transferred to the pupil's individual account in the savings bank. There the Attorney-General quite reasonably said that the schoolmaster's retention of the funds made him during the time of retention an unauthorized and unsupervised savings bank. (See section 279, subdivision 2 of the Banking Law, the statute enacted after that opinion.)

In this case the plant does not deposit the funds received to its own account, but transmits by check or otherwise the whole sum collected upon any pay day as soon as the convenient and usual practices of business will permit.

May 27, 1921.

CHARLES D. NEWTON,
Attorney-General.

To C. R. ROBINSON, *Buffalo, N. Y.*

GENERAL BUSINESS LAW, SECTION 77 — REGISTERED ARCHITECTS.

Section 77 of the General Business Law prohibits a person who is not an architect from being styled under that name.

You state that Mr. Schultze, a registered architect, and Mr. Weaver, a civil engineer, have formed a copartnership under the firm name of Schultze & Weaver, and propose to use a letterhead reading as follows:

“SCHULTZE & WEAVER

Architects

17 East 49th Street

New York.

LEONARD SCHULTZ,

S. FULLERTON WEAVER, C. E.”

You inquire if this would constitute a violation of article 7-A of the General Business Law.

Section 77 of article 7-A of the General Business Law provides as follows:

“Registered architects. Any person residing in or having a place of business in the state, who, before this article takes effect, shall not have been engaged in the practice of architecture in New York state, under the title of architect, shall, before being styled or known as an architect, secure a certificate of his qualification to practice under the title of architect, as provided by this article. Any person who shall have been engaged in the practice of architecture under the title of architect, before this article takes effect, may secure such certificate, in the manner provided by this article. Any person having a certificate pursuant to this article may be styled or known as a registered architect. No other person shall assume such title or use the abbreviation R. A., or any other words, letters or figures to indicate that the person using the same is a registered architect; but this article shall not be construed to prevent persons other than architects from filing applications for building permits or obtaining such permits.”

Concededly, Mr. Weaver is not an architect and the law specifically prohibits him from being styled or known as an architect.

It seems clear to me that the use of the word “architects” in the letterhead is a styling of Mr. Weaver as an architect and clearly a violation of the express provisions of the statute.

June 3, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO STODDARD & MARK, *New York City.*

GENERAL HIGHWAY LAW, SECTION 281 — CHAUFFEURS.

Volunteer drivers of motor fire apparatus not paid for the performance of such duties need not be licensed as chauffeurs.

Must drivers of motor fire apparatus be licensed as chauffeurs?

If the persons driving the motor fire apparatus are not employed by the village and are not paid for the performance of such duty, but perform the same gratis, they do not fall within the definition of the term “chauffeur” as defined in section 281 of the General Highway Law and, therefore, need not be licensed as chauffeurs.

July 11, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO J. ARCHER RACKETT, *Greenport, L. I.*

HIGHWAY LAW, SECTION 286, SUBDIVISION 10 — MOTOR VEHICLES — MIRRORS ON TRUCKS.

All omnibuses regardless of their capacity must be equipped with a mirror.

The State Police asks for an opinion as to whether the omnibus cars, irrespective of weight, must be equipped with a mirror when operated outside cities of the first and second class.

Subdivision 10 of section 286 of the Highway Law provides as follows:

“Every motor truck, omnibus and all motor commercial vehicles of one ton capacity or more, operating upon the public highways outside of cities of the first and second class, shall be equipped with a mirror or other reflecting device so adjusted or adjustable that the operator of such truck shall have a clear and full view of the road and condition of traffic behind such truck.”

This subdivision clearly provides for the equipping of three distinct classes of motor vehicles with mirrors, namely, motor trucks, omnibuses and all motor commercial vehicles of one-ton capacity or more.

I am, therefore, of the opinion that all omnibuses, regardless of their capacity, must be equipped with a mirror in order to comply with subdivision 10 of section 286 of the Highway Law.

June 15, 1921.

CHARLES D. NEWTON,
Attorney-General.

To GEORGE F. CHANDLER, *Superintendent State Police.*

RESIDENCES OF INSANE PERSON — INTERSTATE COMITY.

Reception of alleged insane persons from other States who have formerly resided in the State of New York must first be determined by the laws of residence of the State to which the patient has gone, and secondly, by the comity existing between the States in question.

The State Hospital Commission makes inquiry as to whether or not the State of New York should receive one Catherine Reardon, now an inmate of the St. Joseph's Home for the Blind, Jersey City, N. J.

It appears from the facts submitted in your correspondence that the patient was born at Lake Mahopac, N. Y., and that she was transferred to the said New Jersey Home for the Blind on July 16th, 1910, where she now is, and further, that she is of the age

of twenty-one years. The State of New Jersey requests that she be returned for institutional care in the State of New York. It would seem to me that it should be further ascertained whether or not the said St. Joseph's Home for the Blind is an institution maintained under the direction of the overseer of the poor of any township, city or borough in the State of New Jersey.

From an opinion of the Attorney-General's Reports of 1912, vol. 2, page 273, it does not appear that section 40 of the Poor Law of the State of New York, nor any other section thereof, determines the residence of a person as between two or more States. It further appears in said opinion that there is no act of Congress regulating the support of poor persons.

“ * * * There is no act of Congress regulating the support of poor persons as between States. * * * ”

It does not appear that there is any doctrine at common law which applies to these cases.

The compiled statutes of the State of New Jersey, volume 3, page 4011, section 1-a read as follows:

“ Section 1. That any person or persons who shall have last resided in any township of this State for the period of ten consecutive years, shall be considered as legally settled in said township, provided, that this act shall not be so construed as to give legal settlement to any person or persons, inmates of any home for feeble-minded, home for old people or home for the homeless, nor to any person who may be or may have been maintained by the overseer of the poor of any township, city or borough during said ten consecutive years. (P. L. 1886, p. 208, as amended, P. L. 1887, p. 80, P. L. 1890, p. 495, and P. L. 1891, p. 422.)

The above statute offers the only prohibition to the patient's gaining a residence that I have been able to find, and it would seem to me that she can only be precluded from having gained a residence in the State of New Jersey by the said State showing that the institution in which she has for the last eleven years been confined is, and has for the last mentioned period been maintained by the overseer of the poor of the township, city or borough in which the said institution is located. If said institution is not so maintained, your determination as to whether or not you should receive this girl as a charge upon the State at the request of the authorities of the State of New Jersey, is a matter to be deter-

mined in the administrative discretion of the State Hospital Commission and should be governed to some extent at least by the principles of comity existing between the two States.

June 18, 1921.

CHARLES D. NEWTON,
Attorney-General.

To E. S. ELWOOD, *State Hospital Commission.*

CIVIL SERVICE LAW — SECTION 21-A AS AMENDED BY CHAPTER 54, LAWS 1921 —
RETIREMENT — CIVIL WAR VETERANS — PENSION — MAINTENANCE.

Chapter 54, Laws 1921, amending section 21-a of the Civil Service Law is retroactive.

In computing the amount of pension under section 21-a maintenance allowed during last year of employment should be taken into consideration in determining the salary paid.

The fiscal supervisors asks for an opinion as to the application of section 21-A of the Civil Service Law to certain situations existing in your department with reference to retirement and pensions.

Section 21-A originally read as follows:

"Section 21-A Retiring Veterans of the late Civil War and granting them pensions. Every soldier, sailor or marine of the army or navy of the United States in the late civil war, honorably discharged from service, who shall have been employed for a continuous period of ten years or more in the civil service of the state of New York, and who shall have reached the age of seventy years, upon his own request, or if employed in manual labor, upon becoming incapacitated for performing manual labor, shall be retired from his employment by the state of New York, and thereafter and during his life, the state department or institution which employed him at the time of his retirement, shall pay to him, in the same manner that the salary or wages of his former position were customarily paid to him, an annual sum equal in amount to one-half the salary or wages paid to him in the last year of his employment; provided, however, that the amount so to be paid to such retired veteran shall not exceed the sum of one thousand dollars per annum."

It will be noted that the amount of the pension to be paid in any case shall not exceed the sum of one thousand dollars.

Chapter 751 of the Laws of 1920 amended such section by omitting the words, "provided, however, that the amount so to be paid to such retired veteran shall not exceed the sum of one thousand dollars per annum." This resulted in the removal of the maximum amount which might be paid to any retired veteran under this section. Chapter 54 of the Laws of 1921 further amended such section by adding, "The state department or institution which employed a soldier, sailor or marine, who shall have been retired from said employment under the provisions of this section prior to May twelfth, nineteen hundred and twenty, shall pay to him in the manner above specified, during his life, an annual sum, from and after said twelfth day of May, nineteen hundred and twenty, equal in amount to one-half the salary or wages paid to him in the last year of his employment."

Specifically answering your questions:

As to 1. I am of the opinion that chapter 54 of the Laws of 1921 is retroactive with respect to employees of your department retired under section 21-A of the Civil Service Law prior to May 12, 1920, and they are entitled to an increase in pension as provided for under chapter 54 dating back to May 12, 1920.

As to 2. I am of the opinion that chapter 54 of the Laws of 1921 is retroactive with respect to employees of your department retired under section 21-A of the Civil Service Law, subsequent to May 12, 1920, and they are entitled to an increase in their pension as provided for in said chapter 54 dating back only to the time of their retirement.

As to 3. In computing the amount of pension granted under section 21-A of the Civil Service Law, maintenance allowed to the retired officers or employees during the last year of such employment should be taken into consideration in determining the salary paid. (See Opinion of Attorney-General, 1916, page 281.)

In arriving at the amount to be allowed for maintenance, you should be guided by schedule rate allowed as and for commutation in lieu of maintenance in your department. You would not be controlled by the rules fixed by the Comptroller under the employee's retirement system.

June 23, 1921.

CHARLES D. NEWTON,
Attorney-General.

To FRANK R. UTTER,
State Fiscal Supervisor.

SAVINGS BANK INVESTMENTS — SUBDIVISION 3, SECTION 239 OF THE
BANKING LAW.

"The real estate series bonds of North Dakota, under chapter 154, Laws of 1919, North Dakota, are bonds of a state of the United States within the provisions of the Banking Law regulating investments by savings banks, and such bonds may be purchased by the savings banks organized within the State."

We acknowledge your inquiry concerning the investment by the savings banks of this State in bonds issued by the State of North Dakota, distinguished as "*Real Estate Series*."

The issue of bonds in question is authorized by chapter 154, Laws of 1919, North Dakota, in effect February 25th, 1919. This act provides in part as follows:

Section 1. Directs the issue of bonds of the State of North Dakota to be known as "Bonds of North Dakota, Real Estate Series."

Section 3. "Said bonds shall be executed by the Governor and the State Treasurer, under the great seal of the State, and shall be attested by the Secretary of the State. The Auditor and Secretary of the State shall endorse on each such bond, when issued, a certificate showing that it is issued pursuant to law and is within debt limit. The bonds so issued shall be designated bonds of North Dakota, Real Estate Series."

Section 6. "Upon such delivery of bonds so purchased and paid for, the faith and credit of the State of North Dakota is pledged for the payment thereof, both principal and interest, to the lawful owner or owners thereof upon presentation for payment, according to law."

Section 8. "The State Treasurer shall pay the interest on said bonds upon presentment to him of the coupons for such interest when due, and shall redeem said bonds upon their maturity by paying the principal thereof, all such payments being made from the real estate payment fund without auditor's warrant."

Section 13. Directs that in the event of a deficiency in the fund provided for the payment of such bonds, the State Board of Equalization shall include in the next annual tax levy such tax as shall be necessary to meet the indicated deficiency and the proceeds of such tax shall be placed by the State Treasurer in such fund.

Section 15. Limits the amount of bonds issued under this act to \$10,000,000.

It, therefore, appears that the bonds in question are the direct obligations of the State of North Dakota within the terms of

sub-division 3, Section 239 of the banking law, and upon proof being furnished to the effect that there have been no defaults by the State of North Dakota within the period prescribed in that statute the savings banks in this State may lawfully invest in such bonds.

July 7, 1921.

CHARLES D. NEWTON,
Attorney-General.

To GEORGE V. MC LAUGHLIN,
State Supt. of Banks.

BANKING LAW, SECTION 239, SUBDIVISION 3 — SAVINGS BANKS INVESTMENTS.

Savings banks incorporated in this State cannot invest in certain notes issued by the Board of Visitors of "The Citadel," a military college of South Carolina, such notes not being the bonds or interest-bearing obligations of any state of the United States.

With respect to your inquiry relative to the investment by savings banks of the State in certain notes issued by the board of visitors of "The Citadel," a military college in South Carolina, permit me to say that I have carefully examined a copy of one of the notes, together with the various certificates, resolutions and other documents submitted in connection therewith.

The note is issued by the board of visitors, to wit: "for value received, the board of visitors of The Citadel, the Military College of South Carolina, hereby promises to pay to the order of. It is their promise to pay and execute by the board through their chairman and secretary. There is no reference in the note to the State of North Carolina nor is there any agreement on its part to pay the note. The joint resolution authorizing the execution of these notes recites "which said notes are hereby declared to be the obligation of the State of South Carolina, for the payment of which note or notes the revenues to be raised by the aforesaid levy are hereby pledged to be used for the retirement of said notes as they mature, etc." In fact we have a State agency issuing notes guaranteed by the State to the extent of the revenues raised by the enactment authorizing their issue.

The authority for savings banks in the State of New York to invest deposits in this class of securities is contained in Banking Law, section 239, subdivision 3. "A savings bank may invest the moneys deposited therein * * * in the following property and securities and no others and subject to the following restrictions."

3. "The stocks, bonds or *interest-bearing obligations* of *any state of the United States* upon which there is no default and upon which there has been no default for more than ninety days."

In construing this provision of the statute Attorney-General O'Malley held that the securities must be issued by the State and have back of them the guarantee of the State. Report of the Attorney-General, 1909, page 30. This opinion was followed by Attorney-General Carmody's Report of 1911, page 611. This ruling was made in relation to the legality of the bonds of the Port Commission of the State of Louisiana and the facts submitted upon that inquiry were very similar to those under consideration. So much so in fact, that the reasoning in that matter furnishes a sound precedent for my conclusions in this matter. Consequently, I am of the opinion that the notes of the board of visitors of "The Citadel" of the military college of South Carolina are not interest-bearing obligations of a State of the United States in which savings banks organized and doing business in this State may invest its funds pursuant to the provisions of the Banking Law above quoted. Attention must also be given to the remaining portion of subdivision 3, section 239, as follows: "provided that within ten years immediately preceding the investment such State has not been in default for more than ninety days in the payment of any part of principal or interest of any debt duly authorized by the Legislature of such State to be contracted by such State since the first day of January 1878." This statute requires as a preliminary to such investments the submission of proof to the effect that no such defaults have occurred upon the obligations of such State within the period prescribed, and without the establishment of such fact the deposits in the savings banks in this State cannot be invested in such securities. No evidence of this character described has been submitted with your inquiry and this presents another reason why the investments of such securities cannot be lawfully made.

July 7, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO GEORGE V. McLAUGHLIN, *State Superintendent of Banks.*

BUSINESS CORPORATION LAW, SECTION 2; GENERAL CORPORATION LAW, SUBDIVISION 2, SECTION 2, SUBDIVISION 2, SECTION 3; STOCK CORPORATION LAW, SECTION 52; SUBDIVISION 1, SECTION 293, BANKING LAW.

Domestic business corporations can buy and sell the bonds and stocks of other corporations except they cannot engage in the negotiation of securities described in subdivision 1, section 293 of the Banking Law.

1. May a domestic real estate corporation organized under the Business Corporations Law buy for itself the bonds of other domestic real estate corporations organized under the Business Corporations Law and sell the same to the general public?

2. May it buy the stock of a similar corporation and sell the same to the general public?

3. May a domestic real estate corporation organized under the Business Corporations Law sell to the general public as agent or broker the bonds of other domestic real estate corporations organized under the Business Corporations Law?

4. May it do the same with respect to the capital stock of a similar corporation?

Business Corporations Law, section 2, Incorporations — "Except as provided in section 2-A of this chapter, three or more persons may become a stock corporation for any lawful business purpose or purposes other than a moneyed corporation, or a corporation provided for by the Banking * * * Law." Section 2-A of the Business Corporations Law has reference to the practice of law only. A business corporation organized pursuant to the provisions of article 2 of the Business Corporations Law of the State of New York is a stock corporation. Business Corporations Law, section 2. General Corporation Law, subdivision 2, section 2 and subdivision 2, section 3. Such corporations have the authority to purchase and dispose of the stocks and bonds of other corporations, as provided by section 52 of the Stock Corporations Law, as follows: "*Any stock corporation, domestic or foreign, now existing or hereafter organized, except moneyed corporations, may purchase, acquire, hold and dispose of stocks, bonds or other evidences of indebtedness of any corporation, domestic or foreign, and to issue or exchange therefor its stock, bonds or other obligations if authorized so to do by a provision in the certificate of incorporation of any such stock corporation, or in any certificate amendatory thereof or supplementary thereto, filed in pursuance to law.*" Hence, when the article of incorporation contains the necessary provision, a business corporation organized pursuant to the laws of the State of New York, has authority to purchase and sell the stocks and bonds of another corporation, except as right may be restricted by subdivision 1, section 293 of the Banking Law,

to wit: "In addition to the powers conferred by the General and Stock Corporation Laws, an investment company shall, subject to the restrictions and limitations contained in this article, have the following powers:

1. To sell, offer for sale or negotiate bonds or notes secured by deed of trust or mortgages on real property situated in this State or outside of this State, or choses in action owned, issued, negotiated or guaranteed by it, to advance money on the security of such bonds, notes or choses in action; to purchase or otherwise acquire such bonds, notes or choses in action and to pledge them to secure the payment of collateral trust bonds or notes; to sell or otherwise negotiate such collateral trust bonds or notes." It necessarily follows that the answer to your several questions must be in the affirmative, except as to bonds and notes of the character mentioned and described in the provisions of the Banking Law quoted above. The purchase and sale of the bonds and notes last mentioned are expressly reserved from the powers granted to business and stock corporations by the foregoing statutes, and there is no authority for the purchase and sale of such obligations by any corporation other than those organized pursuant to the provisions of the Banking Law of this State.

July 8, 1921.

CHARLES D. NEWTON,
Attorney-General.

To CLIFFORD R. ROBERTS, *New York City.*

VILLAGE LAW, SECTIONS 90, 188-A, 190 — POLICEMEN.

It is the duty of the board of trustees to furnish proper and adequate police protection. Taxpayers not entitled to vote on propositions relative to proper police protection.

An inquiry in relation to the authority of the village board to employ village policemen has been received.

There can be no question of the power of the board of trustees of a village to employ necessary policemen to preserve order and peace, and to protect the safety of the people and property within the corporate limits.

Subdivision 1 of section 90 of the Village Law confers power on the board of trustees to enact ordinances to preserve the public peace and good order generally. Section 188 confers power upon the board of trustees to appoint one or more policemen. Section 188-a confers power on villages of the first and second class to

establish a police department, and, section 190 provides that the board may pay such policemen a salary and fix the amount thereof.

This authority is conferred upon the board of trustees and it is intended that it should be exercised by the board. It is a necessary power incident to the proper conduct of the government of a municipal corporation. It is an inherent power and would be possessed by such corporation, even if it were not expressly conferred by statute. It seems to me the provisions to which I have called your attention expressly confer such power.

There is no provision of the law requiring a vote of the taxpayers on the question as to whether or not the village shall provide proper police protection. The fact that a proposition has been submitted and defeated would have no effect, for a municipal corporation cannot surrender its necessary powers to the whims and caprices of the electors.

It is the duty of the board of trustees to furnish proper and adequate police protection and the expense thereof is a proper municipal charge, and should be raised in the annual tax levy.

July 11, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO ANDREW J. HANMER, *Massena, N. Y.*

COUNTY LAW, SECTION 12, SUBDIVISION 44 — CHARITY EYE, EAR AND THROAT HOSPITAL OF ERIE.

The Board of Supervisors of Erie County may appropriate a lump sum for a hospital, providing there is provision for the audit of payments so that the money will actually be expended only for such patients as are a municipal charge.

A question is presented relative to the constitutionality of the amendment to section 12 of the County Law by the addition of subdivision 44 approved by the Governor on May 2, 1921.

Under the statute the board of supervisors of Erie county appropriated \$2,500 to the Charity Eye, Ear & Throat Hospital of Erie, and your board, I am informed, has issued to the hospital the certificate required by the law that it has complied with your regulations. Mr. Ford of your department informs me that this approval was given subject to my approval of the constitutionality of the law.

The question broadly involved is whether or not local authorities may vote a lump sum to a charitable institution for the care of poor who might otherwise become a direct municipal charge, or

whether under article 8, section 10 and section 14 of the Constitution, only a per capita sum may be voted. Attorney-General Jackson's opinion of May 31st, 1907, denies payments for general overhead for all purposes or to relieve other necessities of the institution that only indirectly, incidentally or remotely contribute to the relief of the poor; yet this does not mean that the money for the poor, as distinguished from private or paying patients, must be apportioned in advance. The Constitution simply prevents the diversion of public funds to the upkeep of an institution upon the ground that the benefit may ultimately trickle through to a few charity patients. This purpose may be safeguarded by a proper audit of the funds as well as by a precise direction in advance that five dollars a week shall be spent upon a particular poor person named in the appropriation.

The amendment carries provision for such an audit. If the funds are wrongfully diverted, the evil can be met and dealt with by the auditing officers named therein. As long as the lump sum is all expended for the poor in the institution, who are a municipal charge, there is no violation of the Constitution. I am bound to assume that the statute will be administered in a constitutional manner. On its face it provides a machinery by which the letter and spirit of the fundamental law can be obeyed.

It is, therefore, my opinion that the amended statute is constitutional and institutions having the certificate provided for therein and required by article 8, section 14 of the Constitution are entitled to whatever appropriations the local legislative boards in their discretion may make, as long as the expenditure is governed by the principle of this opinion.

July 12, 1921.

CHARLES D. NEWTON,
Attorney-General.

To CHARLES H. JOHNSON, *State Board of Charities.*

FOREIGN CORPORATIONS, BUSINESS CORPORATIONS — PURCHASE AND SALE OF STOCKS AND BONDS — GENERAL CORPORATION LAW, SECTION 15; STOCK CORPORATION LAW, SECTION 5; BUSINESS CORPORATION LAW, SECTION 2; BANKING LAW, SUBDIVISION 1, SECTION 293.

A foreign business corporation can only engage in the same business that a similar corporation organized within the State is permitted to do. It can buy and sell the stock of another corporation, but cannot engage in investment business without first complying with the provisions of the Banking Law as to investment companies.

I acknowledge your inquiry concerning the business of the Empire State Finance Corporation stated to be as follows:

"The Empire State Finance Corporation is a corporation organized in February, 1920, under the General Corporation Law of the State of Delaware, and such corporation subsequently was qualified to do business in the State of New York under the General Corporation Law of such State. The corporation is engaged in the business of purchasing promissory notes representing the purchase price, or part thereof, of motor vehicles. Such promissory notes are purchased in some cases from the dealer who has received the same from retail customers in payment of automobiles, and in some cases from the manufacturer or distributor of motor vehicles who has received the same from dealers in payment of a number of cars which such dealers may have bought from such manufacturer or distributor. Such promissory notes are secured by either a chattel mortgage upon the motor vehicle, conditional sale contract, lease, or, in some cases, a trust receipt, according as the particular situation may require. Such instruments securing the promissory notes are, of course, transferred by the seller of the promissory note to the purchaser, namely, Empire State Finance Corporation. The Finance Corporation does not in any way lend money either to the party from whom it acquires the promissory note or to the party making the same. When it acquires a promissory note, it in no case withholds any part of the price which it pays for the same.

"In the ordinary course of its business, said corporation from time to time established lines of credit with banks and borrowed money from such banks to aid it in the transaction of its business. As collateral security for the payment of any loans made to it by such banks, the Finance Corporation would frequently pledge with such banks the various promissory notes which it had purchased and the instruments securing the same. Since such promissory notes so pledged matured at varying intervals, it became necessary for the corporation to withdraw particular notes so maturing from such banks and substitute in lieu thereof other collateral. This involved a large degree of detail work on the part of the lending banks, and proved so cumbersome that several of such banks suggested that it would be advisable that the Finance Corporation should deposit the various notes and the instruments securing the same with some trust company, and issue

collateral notes against them, such trust company to act as trustee of the collateral and to make the proper substitutions of security which the necessities of the situation might from time to time require. The Finance Corporation, then, instead of giving such lending banks its straight promissory note, could give them such collateral trust notes, and all the detail in connection with the care and substitution and withdrawal of the security would be in the hands of one particular institution, which would have the facilities properly to handle the same. For the purpose, therefore, of facilitating in this manner the borrowing of money to carry on its regular business, the Finance Corporation acted upon such suggestions and entered into a collateral trust indenture with Liberty National Bank of New York, the object of which was to accomplish the purposes above set forth. The Liberty National Bank having ceased to exist, and its successor being the New York Trust Company, such New York Trust Company is the successor trustee under such collateral trust indenture."

You desire to be advised whether or not such business can be carried on by a foreign corporation. A foreign corporation can only engage in a business in this State which a similar corporation, organized pursuant to the laws of the State, is authorized to do. (General Corporation Law, section 15.) It is evident from the statement accompanying your letter that the corporation in question is a business corporation which has authority to "purchase, acquire, hold or dispose of stocks, bonds or other evidences of indebtedness of any corporation, domestic or foreign, and issue and exchange, therefore, its bond, stock or other obligations, if authorized so to do by a provision in the certificate of incorporation of such stock corporation," but cannot engage in a banking business. (Section 5, Stock Corporation Law. Section 2, Business Corporation Law.)

Section 293 of the Banking Law authorizes investment companies (1) "to sell, offer for sale or negotiate, choses in action, owned, issued, negotiated or guaranteed by it * * * to purchase or otherwise acquire such * * * choses in action and to pledge them to secure the payment of collateral trust bonds or notes." It has been held that business corporations may issue evidence of indebtedness in payment of its obligations. (*Jacobs v. Monaton Realty Investment Company*, 212 N. Y., 48.) But the Attorney-General, in a letter directed to George I. Skinner, State

Superintendent of Banking, dated May 11, 1918, held that a corporation organized for the following purposes:

"As an example of our method of operation, let us say that the Continental Credit Corporation advances \$40,000 on the accounts of a manufacturer or merchant. As security for the \$40,000 advanced, we have in our possession assigned accounts with a face value of \$50,000 — a margin of safety which is surrendered only when the full loan is paid. The client guarantees the payment of all accounts, thus making of them two-name paper. We deposit this security with a responsible trust company, with whom we have a trustee agreement, and then issue our own collateral trust notes against the accounts so deposited, the trust company certifying to our notes."

was within the provisions of the Banking Law relative to investment companies. The only distinguishing feature between these two companies is the fact that in one case the corporation advanced money for the accounts, and in the other the corporation alleges to have purchased the notes out right. To my mind the variation is not important because the business described seems to be fully covered by the portion of the statute quoted above. I am, therefore, of the opinion that the Empire State Finance Corporation cannot engage in the business described without first complying with the Banking Laws of this State relative to investment companies.

July 16, 1921.

CHARLES D. NEWTON,
Attorney-General.

To GEORGE V. McLAUGHLIN, *State Superintendent of Banks.*

STATE CHARITIES LAW, SECTION 45, CHAPTER 176 OF THE LAWS OF 1921.

The provisions of section 45 of the State Charities Law does not entitle the persons therein mentioned to a house and maintenance, or either, unless the item is included in the schedule filed with the legislative budget committee, as provided by chapter 176 of the Laws of 1921.

We acknowledge your inquiry as to whether or not a schedule filed by the Legislative Budget Committee "assistant superintendent (with house only) \$25,000," as provided by chapter 176 of the Laws of 1921:

"Appropriations hereby made for the several state charitable institutions shall be expended by each institution in

accordance with the provision of this schedule to be filed for each institution by the Legislative Budget Committee, by the State Comptroller, Fiscal Supervisor of State Charities and Civil Service Commission."

limits such employees to the use of a house only notwithstanding the provisions of section 45 of the State Charities Law, to wit:

"No person other than the officers or employees of such institutions and the families of the superintendents, medical officers, adjutants, quarter-masters or stewards necessarily residing therein shall be allowed room and maintenance."

The phrase "allowed room and maintenance" has been held in include a dwelling other than State structures connected with the institution when necessary. Letter of Attorney-General to Joseph E. Elwell, dated April 21, 1914.

The inquiry submitted is similar to the one passed upon by the Attorney-General in a letter to Hon. Ethan A. Nevin, Superintendent of the New York State Custodial Asylum, Newark, N. Y., concerning the fixing of maintenance of officers or employees of that institution, as provided by section 45 of the State Charities Law and section 17 of the State Finance Law providing for a Salary Classification Commission. The Attorney-General held that the Salary Classification Commission could allow or withhold such maintenance. Report of Attorney-General 1910, page 937. To the same effect is a letter of the Attorney-General, dated March 16, 1914, directed to William A. Mallory, Jr., Fiscal Supervisor. The provisions of section 45 of the State Charities Law are not mandatory and the Legislative Budget Committee, acting within the scope of its authority, has power to limit the salary and maintenance of the several individuals named in that section. Consequently, I am of the opinion that the maintenance of the assistant superintendent, as above stated, is limited to the use of a (house only) as provided by schedule of the committee.

July 21, 1921.

CHARLES D. NEWTON,
Attorney-General.

To FRANK R. UTTER,
State Fiscal Supervisor..

CODE OF CRIMINAL PROCEDURE, SECTION 773 — PUBLIC HEALTH LAW,
SECTION 378 — CORONERS.

The particular facts and circumstances connected with the sudden death of a person dying without medical attendance must be considered in the determination as to whether the coroner or the local health officer is charged with the duty of inquiring into the cause of such a sudden death and the duty of certifying as to the cause of such sudden death of a person so dying without medical attendance.

Inquiry is made relative to the duties of coroners under certain circumstances.

The duties of a coroner as defined by section 773 of the Code of Criminal Procedure, quoting from said section, are as follows:

§ 773. "Whenever a coroner is informed that a person has been killed, or dangerously wounded by another, or has suddenly died, under such circumstances, as to afford a reasonable ground to suspect that his death has been occasioned by the act of another by criminal means, or has committed suicide, he must go to the place where the person is and forthwith inquire into the cause of death * * *."

The foregoing section charges the coroner with a positive duty arising out of the facts and circumstances as detailed in the said section. Section 378 of the Public Health Law reads as follows:

"378. Registration of deaths occurring without medical attendance.

In case of any death occurring without medical attendance it shall be the duty of the undertaker, or other person to whose knowledge the death may come, to notify the local health officer of such death, and when so notified the health officer shall immediately investigate and certify as to the cause of death; provided that if the health officer has reason to believe that the death may have been due to unlawful act or neglect, he shall then refer the case to the coroner or other proper officer for his investigation and certification. The coroner or other proper officer whose duty it is to hold an inquest on the body of a deceased person, and to make the certificate of death required for a burial permit, shall state in his certificate, the name of the disease causing death, or, if from external causes, the means of death; whether probably accidental, suicidal or homicidal; and shall, in any case, furnish such information as may be required by the state commissioner of health in order to properly classify the death."

This section of the Public Health Law defines the duties of the local health officer when notified of a case of death, occurring without medical attendance. He is specifically enjoined by the language of the section last quoted to refer the case of a death occurring without medical attendance, that he may have reason to believe was due to unlawful act or neglect, to the coroner or other proper officer for investigation by the coroner or such other proper officer.

The effect of section 378 of the Public Health Law upon the duties of a coroner has been construed as a statute imposing additional duties upon the coroner but as not placing any limitations upon the powers lawfully exercised by the coroner prior to its enactment. (Opinions of Attorney-General, 1914, p. 384.)

As to when the duty of investigating and certifying relative to the death of a person suddenly dying without medical attendance shall be the exclusive function and duty of either the local health officer or coroner, would depend upon the facts and circumstances attendant upon and surrounding such sudden death.

Where the facts and circumstances surrounding a sudden death would bring the case of such sudden death within the provisions of section 773 of the Code of Criminal Procedure above quoted, the coroner is the proper officer to inquire into the cause of death or wounding.

It would follow that the coroner is also the proper officer to inquire into such causes of sudden death as may be referred to him by the local health officer for investigation under section 378 of the Public Health Law.

However, it is conceivable that there may be occasions of sudden death without medical attendance without any circumstances in connection therewith affording any reason or belief that such sudden death was occasioned by an unlawful act, or brought about by neglect, or such sudden death without medical attendance was attended by circumstances that repel any suggestion of being occasioned by an unlawful act or by neglect. In this event, the local health officer alone is charged with the duty of investigating and certifying as to the cause of death.

The sequence in matter of the time in which either the local health officer or coroner may be notified and assume charge of the remains of a person suddenly dying without medical attendance does not of itself determine who, of the two officials, shall be the proper official to certify as to the cause of death. The facts and circumstances attending such sudden death are the factors that

establish the official upon whom the law imposes the duty of making the inquiry as to cause of death. It is conceivable that a case might arise where the inquiry as to cause of death would be clearly within the line of the official duties of the local health officer and the coroner be the first official notified. The coroner by being so notified and attending would not thusly divest the local health officer of his authority to make the inquiry and certify as to the cause of death pursuant to section 378 of the Public Health Law. The converse of this proposition is equally true. A case of sudden death under circumstances that, pursuant to section 773 of the Code of Criminal Procedure, impose upon the coroner the duty of investigating such death and certifying as to the cause of the same, would be a matter for the coroner exclusively, and the fact that a local health officer was also notified of a death occurring under these same circumstances and when so notified started an investigation prior to the time the coroner might have commenced his investigation, would not serve to oust the coroner of his jurisdiction in the matter conferred by said section 773 of the Code of Criminal Procedure.

The construction of the provisions of law defining the respective duties of the local health officer and the coroner as applied to the particular facts and circumstances connected with the sudden death of a person dying without medical attendance, would seem to indicate the proper official who was charged by statute with the duty of inquiring into the cause of such sudden death and to certify as to the cause of such sudden death of the person so dying without medical attendance.

July 23, 1921.

CHARLES D. NEWTON,
Attorney-General.

To JOHN A. CARD, M. D., *Poughkeepsie, N. Y.*

TAX LAW, SECTIONS 82-88 — SALE OF PROPERTY FOR UNPAID TAXES —
EXPENSES OF SECURING DESCRIPTION.

There is no express authority under the provisions of the Tax Law authorizing a legal charge against the real estate to be sold for taxes for the amount of the expense incurred in procuring a correct description of such property for the purpose of enforcing the collection of the taxes due and unpaid thereon by a sale thereof, and no such authority can be implied under any provision of the Tax Law.

Inquiry as to whether there may be included in the expenses of sale of real property sold by the county treasurer for unpaid taxes an item of expense incurred by the supervisor in securing an

accurate description of property to be sold, where the description of such real property in the return of the collector has been rejected by the county treasurer as being so imperfect that the collection of the taxes by sale of said property cannot be enforced, has been received.

The warrant for all items of expense included in the sale of lands for unpaid taxes must be found in explicit terms in the statute. An examination of the provisions of the Tax Law discloses that an accurate description of property assessed is one of the duties imposed upon the officials who prepare the assessment rolls, irrespective of any subsequent sales of lands so described and taxed upon such assessment-rolls. Section 21 of the Tax Law reads in part as follows:

§ 21. Preparation of assessment roll.

1. The assessors shall prepare an assessment roll or rolls, the form of which shall be prescribed or approved by the tax commission, so classified and arranged, with respect to number of parts and number of columns in each part and with such entries and descriptions as shall be sufficient to identify each separately assessed parcel or portion of real estate with the approximate quantity of the square feet, square rods or acres contained in such parcel or portion or a statement of the linear dimensions thereof * * *."

Section 39 of the Tax Law provides that in towns this assessment roll shall be verified and a certified copy thereof filed with the town clerk on or before September 15th of each year and the original roll delivered to the supervisor of the tax district on or before October 1st in each year.

Section 54 of the Tax Law reads as follows:

"§ 54. Description of real property. The Board of Supervisors of each county, at its annual meeting, shall examine the assessment rolls of the several tax districts, and shall make such changes in the description of real property as may be necessary to render such description sufficiently definite for the purposes of collection of taxes by sale thereof. If a sufficiently definite description cannot be obtained during the session, the board shall cause the same to be obtained for the next annual session, and the property shall not be taxed until such description is obtained, and shall then be taxed for the year so omitted, in the manner provided for taxing omitted lands."

Section 39 referred to above also provides that the town clerk to whom the certified copy of assessment-roll shall have been delivered by assessors on or before September 15th in each year shall on November 1st in each year, deliver such certified copy of the assessment-roll to the supervisor of the tax district embraced therein who shall make such corrections thereon as may be made in the original roll by the board of supervisors and shall extend the tax thereon so that such roll shall be in all respects a copy of the original roll to be delivered to the collector.

The provisions of the Tax Law so far mentioned, though containing directions having for their end and purpose accuracy in description of lands assessed for taxation, in no sense indicate that the expenses entailed in the procuring of definite descriptions of lands so assessed shall be a special charge upon the particular parcels of land embraced within any particular description. On the contrary, the describing of lands assessed with sufficient precision to clearly identify said lands, is treated as a matter within the line of the duties of the officials charged by the provisions of the Tax Law with carrying out the procedure outlined in the Tax Law relating to the taxation of real property. Section 82 of the Tax Law provides for the return by the collector of unpaid taxes and directs the collector, in making such return, to add five per centum to the amount of unpaid taxes so returned by him. It further provides:

“The county treasurer in counties in which lands are sold by him for the nonpayment of taxes, is hereby authorized to incur and pay for such expenses as he may deem necessary for the examination of collector's returns and descriptions of property to be sold pursuant to this chapter, and the procurement of proper collector's returns and the examinations and procurement of matters and facts as he may deem necessary to make a valid tax sale hereunder, but such expenses shall not exceed the amount of the five per centum added as aforesaid.”

The authorization of the county treasurer contained in this section, permitted the incurring of a charge against the county generally for the purposes mentioned in the section, limited in amount to the five per centum added by the collector to all taxes returned by the collectors as unpaid. It did not impose any portion of the expense following the exercise by the county treasurer of the authority so conferred upon any parcel of land that might have been described in the return of any collector with taxes due and unpaid thereon other than the addition of the five per centum to the un-

paid taxes upon such a parcel of land as contained in the return of the collector would operate as a contribution to the total expense involved by the county treasurer assuming to act in the manner authorized by the provisions of section 82 quoted above.

Section 88-a of the Tax Law reads as follows:

“§ 88-a. Reassessment of taxes levied in imperfectly described real property. The county treasurer of any county from which accounts of unpaid taxes are not returned to the comptroller, shall examine the accounts of arrears of taxes received from the collector of each tax district and shall reject all taxes charged in real property deemed to be so imperfectly described or erroneously assessed, in form or substance, that the collection of the same by the sale of such real property cannot be enforced and shall, on or before May first, deliver a transcript thereof to the supervisor of the tax district in which the real property on which taxes have been so rejected shall be located. Such supervisor shall, if in his power, within thirty days thereafter, cause an accurate description of such real property to be made and returned to such treasurer, with the correct amount of taxes thereon, each kind of tax being stated separately, and if necessary, he may cause a survey and map of any such real property to be made, and the expense of such survey and map on or for each lot or parcel shall be returned to such treasurer and be a legal charge upon such real property, and be collected with the legal taxes thereon. * * *

This section provides for rejection of taxes on real property imperfectly described and erroneously assessed. The supervisor is charged with the duty of causing an accurate description to be returned to the county treasurer also a statement of correct amount of taxes must be returned. No provision is made for charging the expense incurred in the performance of this duty by the supervisor upon any particular parcel of land. In the performance of this duty, where it may be necessary, the supervisor is authorized to cause a survey and map to be made, the expense thereof to be a legal charge upon the real property of which a survey and map are made. The Legislature has specified the items for which the charge is to be legally assessed against the land. Such items are the survey and map. There is nothing ambiguous in the language of the section. The section must be construed as having the meaning the plain words contained therein import. If the plain words of the section authorized a charge upon lands in arrears for taxes

only to the extent of expense of procuring a map and survey of the same, where such map and survey are necessary to provide a description of said lands sufficiently definite to validate a sale thereof for the collection of the unpaid taxes thereon, no other item of expense can be added as a charge thereon by implication.

Section 106 of the Tax Law referred to in your letter is found in that portion of the Tax Law devoted to regulation of sale of lands by comptroller and the provisions therein authorizing the comptroller to secure definite descriptions of lands to be sold by him, does not apply in any of its terms to sales by the county treasurer.

Section 142 of the Tax Law contains provisions for charging expenses of sales conducted by comptroller in equal proportionate part thereof as estimated by the comptroller upon each parcel of land sold by him, and mentions matters that may properly be included in amount of expenses of sale. Such section, neither by direct provision nor by implication, makes the procuring of definite descriptions of land sold a charge on lands so sold.

Section 158 of the Tax Law reads as follows:

“§ 158. Provisions relative to comptroller to apply to treasurer. The provisions of article six of this chapter entitled ‘sales by comptroller for unpaid taxes and redemption of lands,’ shall, in so far as it is not otherwise herein provided, govern and control the action of the county treasurer, who shall perform the duties therein devolved upon the comptroller and the same rights and remedies shall be deemed to exist under the provisions of this article as are provided for in said article six.”

Applying said section last quoted to the matter which is the subject of this inquiry, an examination of the provisions of the Tax Law contained in article six, being sections 120 to 143, both inclusive, discloses no provision relating to descriptions of real property, charging expense of procuring said descriptions upon land to be sold. In fact, all reference to maps to be furnished states that said maps are to be furnished at the expense of the towns. (Section 121.)

There is no express authority under the provisions of the Tax Law authorizing a legal charge against the real estate to be sold for taxes for the amount of the expense incurred in procuring an accurate description of such property for the purpose of enforcing the collection of taxes due and unpaid thereon by a sale thereof, and no such authority can be implied under any provision of the

Tax Law. Where it is necessary, in order to obtain an accurate description of real estate liable to be sold for taxes, to make a survey and map of such real estate, the expense of said survey and map is a legal charge upon the property of which the survey and map are made and can be lawfully collected with the taxes thereon under the provisions of section 88-a of the Tax Law.

July 26, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO FRED L. CLOCK, *Ithaca, N. Y.*

TAX LAW, SECTION 170-A, CHAPTER 90 OF THE LAWS OF 1921; SECTION 50 OF THE FINANCE LAW; CONSTITUTION, ARTICLE VIII, SECTION 28.

The Tax Commission has authority, pursuant to chapter 650 of the Laws of 1921, to create new positions and to pay the incumbents from the moneys unsegregated at any time during the fiscal year for which the appropriation was made, but the commission cannot grant additional compensation for services previously rendered.

The State Tax Commission desires to be advised as to its authority to establish an office in Brooklyn for the distribution of automobile licenses, etc., either through a new office or the Long Island Auto Club, which previously acted as an agency of the Secretary of the State for the distribution of these licenses.

The President of the commission has been given extensive powers in chapter 20 of the Laws of 1921 reorganizing the department.

Section 170-a. Subordinates. "The president of the commission may appoint such *deputy tax commissioners, tax assistants, agents, statisticians, experts or other assistants or employees* as may be necessary for the exercise of the powers of the commission and the performance of the duties under this chapter, all of whom shall be in the *classified civil service*; and the president of the commission shall *prescribe their duties and fix their compensation*, including the duties and compensation of the secretary which shall not exceed in the aggregate the amount appropriated by the legislature for that purpose. The president of the commission may *transfer officers or employees* from their positions to *other positions in the department* or *abolish or consolidate such positions*. The president of the commission may remove from office any officer or employee in the department."

Section 170-b. Division of bureaus. "*Existing divisions or bureaus in the department or transferred to the department shall continue until consolidated or abolished pursuant to this section.*

The president of the commission may consolidate or *abolish divisions or bureaus*. Each division or bureau in the department shall be in charge of a *commissioner or deputy commissioner* subject to the supervision and direction of the president of the commission, and in addition to their respective duties as prescribed in this chapter, *each division and bureau and the persons in charge thereof* shall perform such other duties as may be assigned to them by the president of the commission."

Section 179-b. Transfer of powers and duties of the secretary of state in relation to motor vehicles. "On and after July first, nineteen hundred and twenty-one, all the powers and duties now conferred or imposed upon the secretary of state under articles eleven and eleven-a, of the highway law, in relation to motor vehicles and motor cycles, shall be transferred to and thereafter shall be exercised and performed by the state tax commission."

Section 9 of chapter 90 of the Laws of 1921. "*Officers and employees of the state comptroller and of the secretary of state exercising functions* which, under the tax law as amended by this act, are transferred to the state tax commission shall, *on and after July first, nineteen hundred and twenty-one, be eligible for transfer and appointment without examination to positions in the state tax department.*"

The foregoing statutes confer upon the President of the Tax Commission the authority to appoint such deputy tax commissioners or various other assistants and employees as may be necessary to carry on the work of the department, *all of whom shall be in the classified civil service of the State, except employees in the office of the State Comptroller and Secretary of State, as may be eligible for transfer and appointment without examination to positions in the tax department.* The President has the authority to fix salaries of such employees which, of course, are limited in the aggregate to the amount appropriated by the Legislature for that purpose. The compensation of such an employee may, of course, be subject to the approval of the Board of Estimate and Control pursuant to chapter 336 of the Laws of 1921.

Section 54-b. "When, by act of the legislature, a state office, board, commission, council or other state body, or state department, is created or reorganized, and a lump sum is appropriated for its maintenance and operation, or for personal service, during the first fiscal year thereafter, no moneys so appropriated shall be available for payments for personal service, except temporary service or day labor, until a *schedule of positions and salaries shall have been submitted to and approved by the board of estimate*

and control and a certificate of such approval filed with the comptroller.

The city of Brooklyn being within a county wholly included within a city is excepted from the provisions of section 283-a of article 11 of the Highway Law, which provides that the county clerk of the several counties of the State shall act as the agent of the Tax Commission in the issue of number plates for passenger and commercial cars and other plates and badges as directed by the tax commission. So that the authority to conduct the affairs of the commission in that county remains in the commission under the general statute. Arrangements for the rental of premises to be used by the agency of the State at the location in question must of necessity be made through the Trustees of Public Buildings pursuant to section 3 of the Public Buildings Law. Subject to restrictions hereinbefore indicated in the foregoing statutes the commission has power to act in the premises.

July 28, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO STATE TAX COMMISSION.

MOVING PICTURE COMMISSION, CHAPTER 715, LAWS OF 1921 — FEES
FOR LICENSES.

Films licensed under subdivision "c," section 6, are not subject to fees, but films mentioned and described in subdivision "b" must pay the fees provided in section 8 of that statute.

We acknowledge the receipt of your letter of the 27th inst., containing an inquiry as to whether or not fees should be charged by the Motion Picture Commission for permits issued under subdivisions b and c of section VI of chapter 715 of the Laws of 1921.

The subdivisions of the section in question read as follows:

"(b) 'Current event' films. The commission may at any time issue a permit for any film portraying current events and not otherwise prohibited by law, without inspection thereof.

"(c) Scientific and educational films. The commission shall issue a permit for every motion picture film of a strictly scientific character intended for use by the learned professions, without examination thereof, provided that the

owner thereof, either personally or by his duly authorized attorney or representative, shall file the prescribed application which shall include a sworn description of the film and a statement that the film is not to be exhibited at any private or public place of amusement.

The commission may, in its discretion, without examination thereof, issue a permit for any motion picture film intended solely for educational, charitable or religious purposes, or by any employer for the instruction or welfare of his employees, provided that the owner thereof either personally or by his duly authorized attorney or representative, shall file the prescribed application, which shall include a sworn description of the film.

No fee shall be charged for any such permit."

It is evident that the Legislature intended to exempt from the payment of any fees all films of a scientific, educational, charitable or religious purpose as mentioned and described in subdivision "c" of the foregoing section. This is indicated by the clause "no fee shall be charged for any such permit," meaning permits issued for such purposes. Permits issued pursuant to the provisions of subdivisions "a" require the payment of a fee at a less rate than that specified in section 8 regulating the fees generally for permits. So that we have one class of films in section 6 requiring the payment of a fee and another class of films for which no fee is to be charged. Subdivision "b" as to "current event" films not having been included in either class heretofore mentioned comes under the general provisions of the act contained in section 8, requiring the payment of three dollars for each one thousand feet, or fraction thereof, of original film and two dollars for each additional copy thereof licensed or permitted by the commission.

July 29, 1921.

CHARLES D. NEWTON,
Attorney-General.

To GEORGE H. COBB, *New York City.*

TAX LAW, SECTION 170-A AND 170-B, CHAPTER 20, LAWS OF 1921; SECTION 9, CHAPTER 90, LAWS OF 1921; SECTION 54-B, LAWS OF 1921; SECTION 283-A OF ARTICLE II OF THE HIGHWAY LAW.

The Tax Commission has authority to employ agents to distribute automobile licenses in the city of Brooklyn, and to arrange for the leasing of premises for that purpose.

The State Tax Department desires to be advised by this department whether or not you have authority to create new positions in the several bureaus of your department subsequent to the action of the Commission and the Board of Estimate and Control as filed with the Comptroller, a tentative segregation, pursuant to chapter 650 of the Laws of 1921, and whether or not money so tentatively segregated remaining unused, may be used to compensate officials and employees in positions subsequently created.

Section 170-a of the Tax Law as added by chapter 90 of the Laws of 1921, provides:

“The president of the commission shall appoint and may remove a secretary. The president of the commission may appoint such deputy tax commissioners, tax assistants, agents, statisticians, experts or other assistants or employees as may be necessary for the exercise of the powers of the commission and the performance of the duties under this chapter, all of whom shall be in the classified civil service; and the president of the commission shall prescribe their duties and fix their compensation, including the duties and compensation of the secretary, which shall not exceed in the aggregate the amount annually appropriated by the legislature for that purpose. The president of the commission may transfer officers or employees from their positions to other positions in the department, or abolish or consolidate such positions. The president of the commission may remove from office any officer or employee in the department.”

Section 179 of the Tax Law, as amended by chapter 90 of the Laws of 1921, transfers the powers and duties of the Comptroller, in relation to the assessment and collection of certain taxes, to the Tax Commission. Section 179-b of the Tax Law, as added by chapter 90 of the Laws of 1921, transfers to the Tax Commission the duties of the Secretary of State in relation to motor vehicles. Section 9 of chapter 90 of the Laws of 1921, provides in part as follows:

“Officers and employees of the State Comptroller and of the Secretary of State exercising functions which, under the tax law as amended by this act, are transferred to the state tax commission shall, on and after July first, nineteen hundred and twenty-one, be eligible for transfer and appointment without examination to positions in the state tax department.”

It, therefore, is evident that the Commission has authority to create new positions or to continue positions previously existing in the bureaus transferred to the tax department.

Chapter 650 of the Laws of 1921, making appropriations for the support of government, provides as follows:

“ The several amounts named in this section, or so much thereof as shall be sufficient to accomplish the purpose designated by the appropriations, are hereby appropriated and authorized to be paid as hereinafter provided, to the respective public officers and for the several purposes specified, which amounts shall be available for the year beginning on the first day of July, nineteen hundred and twenty-one, namely: * * *

For the expenses of maintenance and operation of the state tax department of which not more than \$1,900,000 shall be available for personal service..... \$2,500,000.00

On or before June fifteenth, nineteen hundred and twenty-one, the tax department shall file with the governor, the chairman of the senate finance committee and the chairman of the assembly ways and means committee a tentative segregation of the amount hereby appropriated, and before any moneys shall be paid out of this fund by the state treasurer on the warrant of the comptroller such segregation shall have their approval. No change shall be made in this tentative segregation during the fiscal year commencing July first, nineteen hundred and twenty-one, without the approval of the governor, the chairman of the senate finance committee and the chairman of the assembly ways and means committee. The sum hereby appropriated shall be paid out by the treasurer on the warrant of the comptroller on the order of the tax commission.”

Section 7. “ The salary or compensation of any officer or employee, when not prescribed by law, for which an appropriation is made by this act, may be fixed by the department official or officials appointing such officer or employing such employees in a less but not in a greater sum than the amount herein appropriated for the salary or compensation of such officer or employee.”

Section 8. “ No part of any appropriation made by this act for construction shall be expended for personal service,

except on the approval of the Governor, chairman of the senate finance committee and chairman of the ways and means committee of the assembly. This provision may be complied with by the filing by them with the Comptroller and the Civil Service Commission of a list of the positions so approved and the time for which any person may be employed in such position."

Section 54-b, chapter 336 of the Laws of 1921:

"When, by act of the legislature, a state office, board, commission, council or other state body, or state department, is created or reorganized, and a lump sum is appropriated for its maintenance and operation, or for personal service, during the first fiscal year thereafter, no moneys so appropriated shall be available for payments for personal service, except temporary service or day labor, until a schedule of positions and salaries shall have been submitted to and approved by the board of estimate and control and a certificate of such approval filed with the comptroller."

This section of the Finance Law does not state a time when the certificate of the Board of Estimate and Control shall be filed with the Comptroller. So far as it is concerned said filing might take place either before or after the beginning of the fiscal year for which the appropriation is made. However, the appropriation bill makes ample provision for any emergency that may arise in the reorganization of the tax department. It provides the sum of \$1,900,000 for "personal service" and provides for a tentative segregation of that amount by the department and the approval of such segregation by the Governor, Chairman of the Senate Finance Committee and the Chairman of the Assembly Ways and Means Committee, on or before June 15, 1921. That such tentative segregation was not intended to be final is very clearly indicated by the following provision:

"No change shall be made in this tentative segregation during the fiscal year commencing July 1, 1921, without the approval of the governor, the chairman of the senate finance committee and the chairman of the assembly ways and means committee."

Had the entire amount for personal service been tentatively segregated, no change could have been made in the several subdivisions thereof, except a readjustment of the sums in the several positions, unless there were positions unfilled or a portion of the

sum appropriated unsegregated. It was the evident intent of the Legislature, pursuant to the several statutes quoted above, to give the commission power to create new positions and to provide salaries for such positions from the lump sum appropriated at any time during the fiscal year for which the appropriation was made. The only restriction placed upon the Commission in this respect was the requirement that the salaries for the new positions created, to be paid from the lump sum appropriated, should first be approved by the several officers mentioned in the appropriation bill and in section 50 of the Finance Law creating the Board of Estimate and Control.

Your communication to this office indicates that you desire to appropriate additional sums to pay one employee for extra work in connection with the performing of the duties of his office and to increase the salary of another to the extent of the sum of \$300 by reason of error in fixing his salary at that much less than he had previously received. You have no authority to grant additional compensation for services previously performed.

Constitution, article 8, section 28:

“The legislature shall not, nor shall the common council of any city, nor any board of supervisors grant any extra compensation to any public officer, servant, agent or contractor.”

What the Legislature is prohibited from doing it cannot authorize directly or indirectly any agency to do. That additional salary or compensation cannot be granted has been held in *Marshall v. Hayward*, 74 A. D. 27; *Matter of Mahon v. The Board of Education*, 171 N. Y. 263, but increased salary for future services does not come within the provision of the constitution. (*Young v. City of Rochester*, 73 A. D. 81.)

You may, therefore, increase the salaries of the officials in question for the remainder of the year in the manner above provided, but you have no authority to grant the added compensation for the interval between July 1st, 1921, and the date of the approval of the salary so increased.

August 1, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO STATE TAX DEPARTMENT.

THE CONSTITUTION, ARTICLE III, SECTION 7.

A member of the State legislature is not disqualified and is not obliged to resign in order to be a candidate for an elective city office.

We have your inquiry as to whether or not it will be necessary for you to resign as a member of the State Senate for the term expiring December 31st, 1922, if you accept or obtain a nomination for a city office.

The constitutional provision relative to the disqualification of members of the Legislature is as follows (article 3, section 7) :

“No member of the legislature shall receive any civil appointment within this State, or the senate of the United States, from the Governor, the Governor and the senate, or from the Legislature, or from any city government, during the time for which he shall have been elected; all such appointments and all votes given for any such member for any such office or appointment shall be void.”

The provision “or from any city government” in this section first appears in the Constitution in 1874. Previous to that time the section was the same except the word “time was substituted for the word “term.” This indicates that the phrase “all votes given for any such member for any such office or appointment” had reference to appointments by the votes of the Legislature or any part thereof. It did not extend to the election of a member of the Legislature to an elective office. This provision of the Constitution as amended, including the clause with reference to city government, was passed upon by the Appellate Division, Second Department, in *Stewart v. Mayer*, 15 App. Div., 548. Judge Hatch, in his opinion, stated as follows:

“In other words, we think, the evil which the amendment sought to remedy and prevent was the corruption of the appointing power and the Member of Assembly, rather than to exclude the Member of Assembly from participation in the civil service of the State; and the reason appears quite plain in the fact that between the several sources of the power of appointment mentioned in the Constitution, and a Member of Assembly, there exists a relation by which the one or the other might be influenced in their official action. The appointing power might, in consideration of a vote for a particular measure, hold out as an inducement thereto a promise of appointment to a particular office. So, on the other hand, a Member of Assembly might withhold a vote for a particular measure in order to coerce the appointing power

into a compliance with his demand for civil appointment. In other words, if the power existed to give and the right existed to receive, it could be made the basis of traffic for official action, and this evidently was the evil at which the amendment was aimed."

Such being the purpose of the constitutional provision it does not extend to an elective office. Therefore, I am of the opinion that you will not be obliged to resign as a member of the present State Senate by reason of accepting or securing a nomination for a city office.

August 2, 1921.

CHARLES D. NEWTON,
Attorney-General.

To CHARLES C. LOCKWOOD, *New York City.*

TAX LAW, SECTIONS 16, 17 — EXEMPTION OF REFORESTED LAND.

1. An owner of reforested land may claim exemption from taxation thereon under section 16 of the tax law to a maximum area of one hundred acres; and such land may be in one or more separate parcels in one or more separate tax districts, provided no one parcel is less than one acre and the total acreage does not exceed one hundred acres.

2. An owner of land "occupied by a natural or planted growth of trees" may secure reduction of taxation thereof to the maximum of fifty acres for any one parcel or as many such parcels as he may devote to woodlot purposes in the same or in separate tax districts.

The opinion of the Attorney-General upon the following questions is asked:

1. Can an owner of land classify, under section 16 of the Tax Law, two or more parcels of land separately situated, either in the same tax district or in separate tax districts?

2. Can an owner of lands secure a reduction of assessment on more than one parcel of fifty acres separately situated in the same tax district or in separate tax districts under section 17 of the Tax Law?

Section 16 of the Tax Law provides for tax exemption for thirty-five years of lands planted for forestry purposes, and for partial exemption of forests or brush lands underplanted for the same purposes. Such exemption is subject to various specified requirements and limitations, to which detailed reference now is unnecessary. The introductory clause of the section provokes the request for my opinion on the scope of the section. Such clause, so far as pertinent, reads:

“Whenever the owner of lands, *to the extent of one or more acres and not exceeding one hundred acres*, shall plant the same for forestry purposes”, etc.

By its location and association in the section the underscored phrase might refer to, and constitute a limitation on, the ownership of the lands mentioned immediately preceding. Such an application of this qualifying clause, in my opinion, cannot be sustained. The obvious purpose of the enactment of this section was to promote, and encourage, the development of the forests of the State. There could, then, be no object in denying the incentive of tax exemption to the owner of more than one hundred acres of land. The object sought to be attained would be served as well by inducing the owner of one thousand acres to avail himself of the advantages of the section, as by limiting its operations to an owner of one hundred acres. The phrase cannot, therefore, be considered as restricting the application of the section to an owner of not less than one nor more than one hundred acres of land.

Having held that this qualification does not apply to limit the quantity of land owned by the person or corporation seeking the benefit of the section, it remains to be determined whether it was intended to define the character of any one piece of land that can be made exempt, or to restrict such benefit to a total of one hundred acres for any one owner. It should be kept in mind that the purpose of the enactment of the section was to encourage the growth and preservation of the forests of the state. For that purpose a smaller detached area than one acre devoted to artificial forestry would be of no appreciable benefit to the owner, the community or the state; hence the minimum prescription of an acre.

The same reason cannot account for the maximum limitation of a hundred acres. By common knowledge, a vast territory of this state is available for reforestation, and to increase the wood resource of the State, owners could with advantage be incited to reforest much larger tracts than one hundred acres each. A consideration of subsequent provisions of the section throws light on the purpose of the Legislature in placing such a limit on the area to be affected by the section. The tax exemption provided by the section is for a period of thirty-five years. There is no penalty prescribed for the cutting of timber on lands thus favored, except the resumption of assessment of the land at the same value as other similar properties. In that respect the section provides:

"In the event that lands exempted or reduced in taxation as above provided shall, by act of the owner or otherwise, at any time during the period of exemption or reduction in taxation cease to be used exclusively as a forest plantation to the extent provided by this section to entitle such land to the privileges of this section, the said exemption and reduction in taxation provided for in this section shall no longer apply and the assessors having jurisdiction are hereby empowered and directed to assess said land at the value and in the manner provided by the tax law for the general assessment of land."

In connection with that direction of the law there should be considered the further provisions of the section that, after the expiration of the period of exemption, if the land continues to be "used exclusively for the growth of a planted forest," the timber growing thereon shall be exempt from assessment, and the lands only liable to taxation, and if such timber shall be cut before the land has been assessed and the taxes paid for five succeeding years, the timber growth shall be subject to a tax of five percent of its stumpage value. Further provision is made for notice by the owner of his purpose to cut such timber, and a penalty prescribed for his failure to give such notice and pay the taxes due under the section. This penalty arises, however, only from acts in violation of the statute occurring after the thirty-five years period of exemption and during the five years immediately succeeding such period. It does not apply to acts committed during the thirty-five years. It, therefore, is possible under the provisions of this statute for a land owner to avail himself of the privilege of tax exemption for thirty-four years, and in the thirty-fifth year cut off the timber. Assessment of land is made annually, in the late spring or early summer. If such cutting was done after the assessment of the thirty-fourth year, the whole or a large part of the timber could be cut, removed and sold before the next assessment. The land only, without the timber, then would be assessable; the owner would have enjoyed the benefit of thirty-four years tax exemption, his increasingly valuable property would be relieved of substantial financial charges, and the community and the State would be deprived of the forest benefit which the statutory favor was primarily designed to secure. The larger the reforested area the greater would be the gain of the owner and the greater the loss of the community thus deprived of tax revenue and the forest advantage and protection, the exemption was designed to promote.

The legislature in passing this law, it must be presumed, was aware of the possibilities of operation under it; and, hence, sought to the greatest extent possible to preserve its beneficial effects and to minimize its disadvantages. By limiting the total area of any one owner, for which exemption was possible, to one hundred acres, extensive operators would not be inclined to invoke the statute while the smaller owners would still be induced to seize the advantage of a, to them, substantial inducement to plant and raise forest parks.

For the reason stated, I am of the opinion that the limitation of one hundred acres applies to the total exemptable lands of any one owner, whether in one parcel or several, in one or several tax districts, provided no one parcel is less than one acre.

Passing to your second inquiry, you will observe the limiting language employed in section 17 is markedly different from that in section 16. The latter reads: "Whenever the owner of lands, to the extent of one or more acres and not exceeding one hundred acres, shall plant," etc. Section 17 provides:

"In order to encourage the maintenance of wood lots by private owners and the practice of forestry in the management thereof, the owner of any tract of land in the state, not exceeding fifty acres, which is occupied by a natural or planted growth of trees, or by both," etc.

It is generally known that good husbandry requires that a portion of forest on every farm should be devoted to timber for various uses on the farm. It is desirable that every farm should have such a wood lot. Hence the differing phraseology of the two sections. The first section restricts the total exemption of a single owner to one hundred acres for the reason stated; the second section limits the size of any one piece to which exemption is available. If one owner has several farms in the same or in separate tax districts, it is desirable that each farm should have its own wood lot. Such a wooded area is as necessary to the successful operation of one farm as another. I, therefore, believe that the fifty-acre limitation in section 17 fixes the maximum size of any one parcel, and that a single owner can, by complying with the statute, gain this exemption for as many different parcels, "occupied by a natural or planted growth of trees," no one of which shall exceed fifty acres, as he sees fit to devote to such purpose whether they be in the same or separate tax districts.

August 9, 1921.

CHARLES D. NEWTON,
Attorney-General.

To ELLIS J. STALEY, *Conservation Commissioner.*

NUISANCES — RIGHT OF LOCAL AUTHORITIES TO ABATE.

The right of a municipal corporation to bring an action in equity to restrain the continuance of certain conditions that might be a menace to the health of the people of the municipality was not passed upon in the case of the *City of Yonkers v. Federal Sugar Refining Company*, 136 A. D. 701.

A letter containing a recital of facts indicative of the creation of a public nuisance in the Village of Morristown, received.

Referring to the case of *City of Yonkers v. The Federal Sugar Refining Co.*, 136 A. D. 701, the opinion of the court in said case is particular to state in relation to case then decided that the facts presented therein did not establish that the streets of the city were made unsafe or insecure or that the health of the public while using them was affected. Further the court expressly states that the power of the municipality with reference to abating nuisances affecting health was not considered or attempted to be defined in the decision rendered in said case.

The case of *Hearst v. N. Y. C & H. R. R. Co.*, 215 N. Y. 268, as limited by the decision of *Ball v. N. Y. C. R. R. Co.*, 229 N. Y. 33, indicates the extent of inconvenience or annoyance that may be said to be necessary and incidental to the lawful exercise by the railroad company of its corporate powers.

The decision in the case of *People ex rel. N. Y. N. H. & H. R. R. Co. v. Wilcox*, 200 N. Y. 423, in a sense creates the impression that the redress of the wrongful acts set forth in your letter is really a matter within the line of the duty of the local board of health.

The case of the *Board of Health v. Magill*, 17 A. D. 249, though construing a former statute, by reason of the similarity of the present Public Health Law to the statute construed in that case, is an authority upon the proposition that proceedings brought to enforce the Public Health Law may be brought in the name of the municipality.

The case of *City of Yonkers v. Federal Sugar Refining Co.*, 136 A. D. 701, by virtue of an express statement contained in the reported opinion does not decide that a municipal corporation cannot bring an action in equity to restrain the continuance of certain conditions that are a menace to the health of the people of the municipality.

The actual conditions existing about which complaint has been made are matters within the personal knowledge of the officials of the municipality, and whether such conditions so existing have been created by corporate activities of the railroad company, not necessary and incident to the lawful operation of the railroad in ques-

tion, is a matter for the local officials to determine in the first instance.

The cases mentioned above support at least the inference that a court of equity will entertain an action brought by a municipal corporation to restrain the continuance of a nuisance that imperils or impairs the health of the people of such municipality.

August 29, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO FRANK L. SCOTT, *Morristown, N. Y.*

EDUCATION LAW, SECTIONS 570-571, MEDICAL INSPECTORS — COMPENSATION.

The details of the contract of employment of a medical inspector of schools including compensation and the extent of the time of such medical inspector that is to be devoted to his duties, are details of the contract of employment between such a medical inspector and the local education authorities, and there is no statute that defines the extent of time that a physician who has been appointed a medical inspector of school children shall devote to the duties of such office.

A letter making inquiry as to the provisions of law relative to the extent of the time that a school physician is required to devote to the performance of his duties as such school physician, has been received.

The following quoted provisions of the Education Law pertain to medical inspection in schools:

“Section 570. Medical inspection to be provided. Medical inspection shall be provided for all pupils attending the public schools in this State, except in cities of the first class as provided in this article. Medical inspection shall include the services of a trained registered nurse, if one is employed, and shall also include such services, as may be rendered as provided herein in examining pupils for the existence of disease or physical defects and in testing the eyes and ears of such pupils.”

“Section 571. Employment of medical inspectors. The board of education in each city and union free school district and the trustee or board of trustees of a common school district, shall employ, at a compensation to be agreed upon by the parties, a competent physician as a medical inspector, to make inspections of pupils attending the public schools in the city or district. If appointed by a board of education of a city such physician shall reside within the city. The physi-

cians so employed shall be legally qualified to practice medicine in this State, and shall have so practiced for a period of at least two years immediately prior to such employment
* * *"

The two sections of the Education Law above set forth authorize medical inspection of pupils attending the public schools and the appointment of a competent person to carry out the duties entailed by such medical inspection of pupils. The details of the contract of employment of such medical inspector, including his compensation, are matters to be decided upon by the proper school authorities of the city and the person employed as medical inspector. The Legislature has not attempted to define the extent of time that a physician who has been appointed a medical inspector of school children shall devote to the duties of such office.

August 30, 1921.

CHARLES D. NEWTON,
Attorney-General.

To LEWIS E. MOREY, *Lockport, N. Y.*

PUBLIC HEALTH LAW; SANITARY CODE—MILK—LOCAL HEALTH OFFICERS.

Chapter 3 of the Sanitary Code imposes conditions with respect to the issuing of permits by local health officers to firms, associations, corporations or individuals selling milk at retail in any municipality, and a local health officer has authority to exempt from said regulations a person selling milk from not more than one cow.

Inquiry is made as to regulations in force relative to the keeping of cows and disposing of the milk from the same within the city limits was duly received.

I advise you that under section 2-B of the Public Health Law the public health council created by such law is authorized to establish sanitary regulations collectively called a Sanitary Code, the provisions of which Code shall have the force and effect of law, and any violation of any portion thereof is declared to be a misdemeanor. Among the matters taken up by the public health council was the matter of the sale of milk in municipalities. By force of regulation one of chapter 3 of said Sanitary Code no corporation, association, firm or individual was to sell milk or cream at retail in any municipality without a permit from the health officers thereof, which permit was to be issued subject to the conditions imposed by the Code. The health officer was allowed to exempt from this regulation a person selling milk from not more than one cow. It

was made the duty of the local health officer or his representative to make a sanitary inspection of every dairy where milk or cream was produced for sale at least every twelve months between November 1st and April 30th of each year. If as a result of such inspection the dairy so inspected did not meet the requirements of the Sanitary Code, the health officer has no discretion but to refuse to issue a permit with the proviso mentioned above, that he may allow the person inspected who fails to meet the requirements of the Sanitary Code, to keep one cow and sell the milk therefrom.

This regulation applies to the whole State of New York outside of New York City, and is not a matter of discretion upon the part of the health officer as to when or where or as to whom the regulation shall be enforced.

Under the facts set forth the health officer was bound to enforce the law as he found the same applicable to facts pertaining to the dairy of the man whom you mention.

August 30, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO FRANK L. WISWALL, *Albany, N. Y.*

**CORPORATIONS — VOLUNTARY DISSOLUTION — PUBLICATION OF CERTIFICATE
UNDER SECTION 221, GENERAL CORPORATION LAW.**

Under Section 221 of the General Corporation Law, where one of the duplicate certificates of dissolution issued by the Secretary of State has been filed in the office of the clerk of the county in which the corporation has its principal business, such corporation is deemed to be dissolved and while the statute, no doubt, contemplates that such certificate shall be published within a reasonable time where no rights of creditors or third parties have intervened, the failure to promptly publish can be cured, even though more than a year has elapsed since the certificate was issued.

It is stated that on December 24th, 1918, the Secretary of State issued a certificate certifying that the Bay Boulevard Realty Company had filed in his office papers for the voluntary dissolution of such corporation, pursuant to section 221 of the General Corporation Law, and that it had complied with said section in order to be dissolved, but that through inadvertence the publication of a copy of the certificate of dissolution as contemplated by the statute was omitted. Inquiry is made as to whether publication can now be made or whether it will be necessary to take steps anew to procure another certificate of dissolution.

Subdivision 2 of section 221 of the General Corporation Law provides, in substance, that when one of the duplicate certificates issued by the Secretary of State, showing compliance with said section, has been filed in the office of the clerk of the county in which the corporation has its principal office, "thereupon such corporation shall be dissolved and shall cease to carry on business, except for the purpose of adjusting and winding up its affairs." It is further provided that a copy of such certificate shall be published at least once a week for two weeks in one or more newspapers published and circulating in the county, in which the principal office of such corporation is located, and, at the expiration of such publication, the board of directors shall proceed to wind up the business and affairs of the corporation, and after paying or providing for the payment of its debts and obligations, make distribution among the stockholders. By the terms of the statute a corporation, nevertheless, continues in existence for the ordinary purpose of liquidation, and may sue or be sued "until its business or affairs are fully adjusted and wound up."

An analysis of the provisions of said section 221 seems to indicate that the scheme of the statute is that after due notice has been given, pursuant to the resolution of the board of directors, and opportunity for consideration and discussion of the question of dissolution afforded to stockholders, the prescribed papers filed with the Secretary of State and one of the duplicate certificates issued by that officer filed with the proper county clerk "thereupon" the corporation shall be dissolved. After the filing with the county clerk of such duplicate certificate the powers formerly belonging to the corporation become limited, and it continues in existence for certain purposes only, which are incidental to the liquidation of its business and affairs. The attempted exercise of further powers undoubtedly could be restrained.

The publication of a copy of the certificate is, no doubt, meant for the purpose of informing creditors, those interested in the company's affairs and the general public of the status of the corporation, as well as to assist in bringing to the attention of the directors claims of which they may not be aware. It will be noted that the time when such publication shall be made is not provided for. As distribution of the surplus under the terms of the statute can be made only after the publication, and after the debts and obligations have been paid or provided for, it is reasonable to assume that in the ordinary case the prescribed publication will be commenced as soon as possible. The question of the effect upon the rights of creditors or other persons interested of an

attempted distribution of assets before the completion of publication is not involved in the inquiry submitted.

Ordinarily, where directions are given for the performance of an act, but no time is limited for such performance, the law presumes that the act shall be done within a reasonable time. However, unless there are rights of creditors or third parties intervening, I see no reason why publication in the manner provided for by statute cannot now be made.

September 1, 1921.

CHARLES D. NEWTON,
Attorney-General.

To PRINCE & NATHAN, *New York City.*

PUBLIC HEALTH LAW, SECTION 25 — LABORATORIES — REPORTS — FEES.

A laboratory making the reports provided for in section 25 of the Public Health Law as said law is amended to date, is not entitled to a fee for forwarding such reports.

A communication making inquiry as to the sums to which physicians or other persons may be entitled under the provisions of section 25 of the Public Health Law for giving the notice of the occurrence of infectious or contagious diseases as mentioned in said section, has been received.

Section 25 of the Public Health Law reads in part as follows:

“§ 25. Infectious and contagious or communicable diseases. Every local board of health and every health officer shall guard against the introduction of such infectious and contagious or communicable diseases as are designated in the sanitary code, by the exercise of proper and vigilant medical inspection and control of all persons and things infected with or exposed to such diseases, and provide suitable places for the treatment and care of sick persons who cannot otherwise be provided for. They may, subject to the provisions of the sanitary code, prohibit and prevent all intercourse and communication with or use of infected premises, places and things, and require, and if necessary, provide the means for the thorough purification and cleansing of the same before general intercourse with the same or use thereof shall be allowed. Every physician shall immediately give notice of every case of infectious and contagious or communicable disease required by the state department of health to be reported to it, to the health officer

of the city, town or village where such disease occurs, and no physician being in attendance on such case, it shall be the duty of the superintendent or other officer of an institution, householder, hotel or lodging house keeper, or other person, where such case occurs, to give such notice. Whenever an examination for diagnosis by a laboratory or by any other person other than the physician in charge of the person from whom the specimen is taken, if any specimen discloses the existence of a case of infectious and contagious or communicable disease, the person in charge of such laboratory or the person making such examination, shall immediately report the same, together with all the facts in connection therewith, to the health officer of the city, town or village where such laboratory is situated, and also to the health officer of the city town or village from which such specimen came and shall keep a permanent record of all the facts in connection with such examination, including the identity of the person from whom the specimen is taken and the name of the physician, if any, sending such specimen. The physician or other person giving such notice shall be entitled to the sum of twenty-five cents therefor, which shall be a charge upon and paid by the municipality where such case occurs. * * *

The portion of said section 25 above quoted, imposes two distinct duties upon two separate classes of persons.

A notice is required to be given by every physician in attendance upon any case of an infectious and contagious or communicable disease required by the State Board of Health to be reported to it, to the health officer of the city, town or village where the disease occurs and in the event there is no physician in attendance then such notice is to be given by the superintendent or other officer of an institution, householder, hotel or lodging house keeper or other person where such case occurs.

A report is required to be made by a laboratory or other person making an examination of a specimen submitted for diagnostic purposes (other than such examination of a specimen submitted for diagnosis by the physician in charge of the case), where such examination discloses the existence of a case of infectious and contagious or communicable disease, of such disease and all the facts in connection therewith, said report to be made to the health officer of the city, town or village where such laboratory is situated and also to the health officer of the city, town

or village from which such specimen came and in addition to said report such laboratory is required to keep a permanent record of all the facts in connection with such examination, including the identity of the person from whom the specimen was taken and the name of the physician, if any, sending such specimen.

The Legislature makes provision for the payment to the physician or other person giving the notice mentioned in said section. It makes no provision for payment of persons making the report required by this section in words to that effect.

Having in mind that the report required by the provisions of this section from a laboratory might simply duplicate as far as the existence of an infectious and contagious or communicable disease was concerned, the information acquired from the notice which physicians or other persons were obliged to furnish under this section, it cannot be said that the Legislature did not omit to provide compensation for the preparation and sending of the reports mentioned in this section without an intent so to do, and further, the distinct character of the report being detailed in the section and the persons whose duty it was to make such reports being a distinct class from those persons who were required to give the notice mentioned in the section, forbids a construction of this section which would imply that under the language of this section the words "notice" and "report" should be considered synonymous.

Reading section 25 of the Public Health Law as a whole, it would appear that the Legislature had made no provision for the compensation of persons or a laboratory making the reports required to be made where an examination of a specimen submitted for examination for diagnostic purposes disclosed the existence of an infectious and contagious or communicable disease.

September 8, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO PAUL B. BROOKS, *State Laboratory.*

HIGHWAY LAW, SECTION 99 — TOWN SUPERINTENDENT — ELECTION — BRIDGES.

Electors of the village are entitled to vote for office of town superintendent of highways and to vote on propositions to raise funds for building bridges, where the village is liable for its share of the expense of construction.

You inquire if the electors of the village of Constableville are qualified to vote for town superintendent of highways, and, also,

if the taxpayers of such village are qualified to vote on a proposition to raise moneys for the erection of bridges located outside of the incorporated village which is a separate highway district.

Unless your village is one incorporated under a special charter, exempting property within its limits from all taxation for laying out highways and for the construction and maintenance of bridges, the electors of said village are entitled to vote for the office of town superintendent of highways.

All the taxable property of the town, including that situate within an incorporated village which forms a separate road district, is taxable for charges and expenses connected with the highways except as provided by section 99 of the Highway Law, which exempts certain villages from the levying and collection of taxes for the repair and improvement of highways, including sluices, culverts and bridges having a span of less than five feet. If the bridges to be erected have a span of five feet or more, the taxable property within the village would be chargeable with its *pro rata* share of the expense, and section 59 of the Town Law would have no application.

The village being liable to pay its share of the expense for the construction of such bridges, the electors of such village would be entitled to vote for town superintendent and the taxpayers would be entitled to vote on the proposition to raise funds for such purposes.

September 9, 1921.

CHARLES D. NEWTON,
Attorney-General.

To E. M. BAGG, *Constableville, N. Y.*

TRANSPORTATION CORPORATIONS LAW, SECTION 81 — PETITION.

Section 81 of the Transportation Corporations Law confers power upon the town board to establish a water supply district. No petition of the taxpayers is necessary.

Inquiry is made whether it is necessary to have a petition from 51 per cent of the taxable property in the entire new district or simply from the section to be added, where a water district formed under section 81 of the Transportation Law is extended.

Section 81 of the Transportation Law confers power on the town board to establish a water supply district in such towns outside of a city or incorporated village therein by filing a certificate describing the bounds thereof in the office of the town clerk. There is no provision in this section requiring a petition

to be filed by the owner of the taxable property within the district. It seems to me this section, therefore, confers power upon the town board to enlarge said district at any time by merely filing a certificate describing the bounds in the office of town clerk, and, it would not be necessary to have a petition signed by the owners of the taxable property within the district as presently constituted or of the property to be included by the enlargement.

I am of the opinion that article 18 of the Town Law, in relation to water has no application where the water district is established pursuant to section 81 of the Transportation Law and supply furnished by a transportation corporation.

September 13, 1921.

CHARLES D. NEWTON,
Attorney-General.

To HIRAM R. SMITH, *Hempstead, N. Y.*

BRIDGES SPANNING THE CANALS AND CANALIZED STREAMS OF THE STATE — DUTY TO MAINTAIN SAME DEVOLVES UPON LOCAL AUTHORITIES IN THE ABSENCE OF STATUTES IMPOSING SAID DUTY UPON THE STATE — CITY OF ITHACA OBLIGATED TO MAINTAIN BRIDGES SPANNING CAYUGA LAKE INLET.

In the absence of some special statutory provision imposing upon the State the burden of maintaining and repairing highway bridges crossing the canals or canalized streams of the State, the duty of so doing rests upon the local authorities. The foregoing rule applied to certain bridges spanning the Cayuga Lake inlet in the city of Ithaca.

I am of the opinion that the State is not obligated to maintain or repair the Buffalo street, Seneca street or State street bridges which span the Cayuga lake inlet in the city of Ithaca.

As I pointed out to you in my letter of September 8, 1919 (relating generally to the question whether the State or municipalities were obliged to maintain highway bridges crossing the canal), in the absence of some special statutory provision imposing upon the State the burden of maintaining and repairing highway bridges, crossing the canal, the burden of so doing rests upon the local authorities.

I have examined with care the various special laws enacted from 1835 to date, providing for the dredging or otherwise improving of the Cayuga lake inlet, including chapter 267, Laws of 1908, pursuant to which the bridges to which you refer were last rebuilt by the State, but I fail to find that any thereof has either by express language or by fair implication cast upon the State the duty of maintaining or repairing these bridges. The question remains as to whether these bridges fall within the classification

of bridges treated in section 121 of the Canal Law (chapter 207, Laws of 1839), which provides as follows:

“§ 121. Farm and road bridges. The superintendent of public works is authorized and required to construct and hereafter maintain, at the public expense, road and street bridges over the canals, in all places where such bridges were constructed prior to the twentieth day of April, eighteen hundred and thirty-nine, if, in his opinion, the public convenience requires that they should be continued, whether theretofore maintained at the expense of the state or of the towns, villages and cities where they are situate. * * *”

I am persuaded that the provisions of this section do not apply to the bridges in question. I understand that the Buffalo street bridge was constructed subsequent to 1839. Assuming this to be the fact, of course section 121 has no application to it.

I understand that the State street (formerly Owego street) and Seneca street bridges were constructed prior to 1839, but it cannot, I think, be held that that they are street bridges “over the canals” within the meaning of that term as employed in section 121 of the Canal Law.

It appears that the Legislature from time to time since 1835 has appropriated moneys for the dredging of the Cayuga lake inlet (which extends from the north end of Cayuga lake northerly to a point beyond the State street bridge) so as to render it navigable and usable in connection with the canal system of the State, and subd. 14 of section 33 of the Canal Law provided that the Superintendent of Public Works should “have charge of and exercise the same powers that he has as to other canals, over so much of the navigable waters of the Cayuga inlet as are necessarily used in connection with the canals; and cause such obstructions to be removed therefrom and such improvements to be made therein as may be necessary, from time to time, to keep the channel of such inlet of sufficient depth and capacity to admit the passage of any boat or water craft navigating the Erie canal”; but this legislation is not, as I view it, such as to constitute the inlet a part or portion of the canal within the meaning of the aforesaid section of the Canal Law. This conclusion is supported by the fact that section 2 of the Canal Law, enumerating the canals of the State, does not refer to or include or embrace this inlet.

Prior to the adoption of the Cayuga and Seneca Canal Law (chap. 391, Laws of 1909), this inlet constituted a mere adjunct to the canal system of the State—a naturally navigable waterway which the Legislature, from time to time, chose to improve so as to render it susceptible of use in connection with the canals of the State.

By an opinion under date of September 27, 1911, addressed to the Superintendent of Public Works, Attorney General Carmody held that so much of the Cayuga lake inlet as is necessarily used in connection with the Cayuga canal constituted a part and parcel of the said canal to be improved as provided by chapter 391, Laws of 1909. It was, as I understand it, improved pursuant to that act to a point northerly of the Buffalo street bridge (the most northerly of the three bridges referred to), and pursuant to the Terminal Act (chap. 746, Laws of 1911) a terminal was constructed north of the Buffalo street bridge.

The portion of the inlet so improved or actually used in connection with traffic on the Cayuga canal, I consider to be a part of the Cayuga canal; but I feel that it would require a strained and unwarranted construction of the statutes and a considerable stretching of the imagination to hold that that portion of the inlet between the Buffalo and State street bridges was a part or portion of the canal system of the State.

I understand that all three of these bridges are fixed bridges of considerably less span and clearance than required by the Barge Canal Law; that the clearance is such that it would be impossible for the boats ordinarily plying the canal to pass thereunder and that little or no commercial traffic or navigation passes under or upstream of either of them, the Barge Canal terminal, as stated, being located between the Buffalo street bridge and Cayuga lake.

I find nothing in the history of these bridges nor any legislative enactment which can fairly be relied upon to cast upon the State the burden of maintaining or repairing the same. Unless and until the Legislature shall make express provision casting this burden upon the State, it remains, in my opinion, with the city of Ithaca.

September 14, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO HON. CHARLES L. CADLE,
Superintendent of Public Works.

The letter of September 8, 1919 referred to in the foregoing opinion reads as follows:

September 8, 1919.

HON. EDWARD S. WALSH,
Superintendent of Public Works,
Albany, N. Y.

DEAR SIR:—I have at hand your communication of the 8th ult. raising the question as to whether the State or the various counties, towns, incorporated villages or cities in which certain highway bridges, altered or rebuilt in the course of the construction of the Barge Canal, are obligated to maintain the same. Your Chief Clerk, Mr. O'Neill, informs me that all of the bridges in question were and are constituent parts of the public highway system and that no special statutory provision exists imposing upon the State the duty to maintain any of the old or the new bridges.

At common law such bridges were considered part and parcel of the public highway, which was under the charge of the local authorities, who were bound to maintain them in a safe condition for use. According to the English decisions the common law devolved the duty of repairing bridges upon the county in which the bridge was situated; but the prevailing rule in this country is to the effect that in the absence of statutory provision providing other means or method of keeping the same in repair, the duty of repairing highway bridges is imposed upon the cities, towns and incorporated villages in which the bridges are located (§§ 11, 61, Elliott on Roads and Streets, 3rd Ed.; Hill v. Board of Supervisors of Livingston Co., 12 N. Y. 52; People ex rel. Morrill v. Supervisors, 112 N. Y. 585).

By chapter 207, Laws of 1839 (now section 121 of the Canal Law) it is provided that:

“The superintendent of public works is authorized and required to construct and hereafter maintain, at the public expense, road and street bridges over the canals, in all places where such bridges were constructed prior to the twentieth day of April, eighteen hundred and thirty-nine, if, in his opinion, the public convenience requires that they should be continued, whether theretofore maintained at the expense of the state or of the towns, villages and cities where they are situate. * * *”

It is incumbent upon the Superintendent of Public Works, at State expense, to maintain and keep in repair all such bridges and the renewals thereof unless he has arrived at the conclusion that the public convenience no longer requires the maintenance of the same. (1909 Opinions of the Attorney-General, p. 645; *People v. Syracuse R. T. R. Co.*, 129 A. D. 800.)

In view of the statement made to me by Mr. O'Neill I assume that none of the bridges to which you refer fall within this classification. If such be the fact, then, in the absence of some special statutory provision imposing the burden of maintaining them upon the State, I think the burden of maintaining and repairing them is by law imposed upon the local authorities.

In certain cases the State by special statutory provision has assumed the duty of maintaining and repairing either the whole or a part of certain bridges spanning the Barge Canal or canalized rivers; but in view of the statement made to me that no such provision exists with respect to any of the bridges here involved, I have, without independent investigation, proceeded upon the assumption that no such statutes exist applicable to any of these bridges.

I find no general statute shifting from the local authorities to the State the duty of maintaining any of these highway structures and so conclude that the duty remains with the former.

The policy and scheme of our statute law with respect to the maintenance and repair of highway bridges, as I read it, is to place this burden upon counties, towns, incorporated villages and cities in which they are located.

Section 250 of the Highway Law provides that:

"The towns of this state, except as otherwise herein provided, shall be liable to pay the expenses for the construction and repair of its public or free bridges constructed over streams or other waters within their bounds, and their just and equitable share of such expenses when so constructed over streams or other waters upon their boundaries, except between the counties of Westchester and New York; and when such bridges are constructed over streams or other waters forming the boundary line of towns, either in the same or adjoining counties, such towns shall be jointly liable to pay such expenses. When such bridges are constructed over streams or other waters forming the boundary line between a city of the third class and a town, such city and town shall be liable each to pay its just and equitable

share of the expenses for the construction, maintenance and repair of such bridges. Except as otherwise provided by law, a city of the third class shall be deemed a town for the purposes of this article. Each of the counties of this state shall also be liable to pay for the construction, care, maintenance, preservation and repair of public bridges lawfully constructed over streams or other waters forming its boundary line, not less than one-sixth part of the expense of construction, care, maintenance, preservation and repair, and, except in a county containing a portion of the Adirondack park, the whole or such expenses of public bridges lawfully constructed or to be constructed over streams, or waterways, intersecting county roads."

Other statutory provisions exist whereby the whole or a part of the cost of maintaining and repairing bridges may be imposed upon counties.

Article VII of the Highway Law provides for State aid for the repair and improvement of highways, including bridges having a span of less than five feet; but the State contributes nothing towards the maintenance or repair of bridges having a span of more than five feet.

Section 170-c (chap. 324, Laws of 1918) contains provisions authorizing the State Commissioner of Highways, in his discretion, to maintain as in article VII provided, the pavement and shoulders of the approaches to bridge structures carrying such highway across a part of the canal system of the State which intersects a State or county highway. This would seem to negative any duty on the part of the State to maintain the bridge proper.

Most of the bridges to which you refer were evidently altered or reconstructed pursuant to the provisions of section 3 of the Barge Canal Law providing that "New bridges shall be built over the canals to take the place of existing bridges whenever required, or rendered necessary by the new location of the canals." It contains no evidence of an intent on the part of the Legislature to impose upon the State the cost of maintaining or repairing such reconstructed bridges.

Some of the bridges to which you refer, including the Sylvan Beach bridge, Belgium bridge, Cold Spring bridge, Bonta's bridge and the Free bridge were merely altered as to type, style, elevation or dimensions to conform them to Barge Canal requirements. Such a change does not, in my opinion, relieve the local authori-

ties of the duty theretofore devolved upon them to maintain the bridges; nor are they relieved by the fact that the bridge spans the canal or canalized waterway.

Other of the bridges to which you refer, including the Brewerton and Oak Orchard bridges, were altered by raising the same and the construction of a fixed span in place of a draw span, which was built and maintained by the State. The fact that the State heretofore maintained the draw span does not, in my opinion, make it incumbent upon it to maintain that part of the new bridge which supplants the draw span. Nor does the fact that the new bridge is longer or heavier or more expensive of maintenance than the old relieve the local authorities of the duty of maintaining the same.

I think that the same reasoning and rule apply to the new Three River Point bridge which, as I understand it, was reconstructed to take the place of the old highway bridge.

The Mosquito Point bridge is a new bridge built by the State across the new inland route of the canal to connect the public highway leading to the old steel bridge over the Seneca river with the old steel bridge. It was built, I assume, pursuant to the aforesaid provisions of section 3 of the Barge Canal Law. I know of no provision making it incumbent upon the State to maintain or repair it, and, accordingly, am of the opinion that the duty of maintenance and repair rests upon the local authorities.

This same line of reasoning and rule apply to the County Line bridge.

With respect to the Howland's Island bridge, you do not make it clear whether or no it is a bridge connecting up parts of a public highway. You say it was built by the Sibley estate and by it posted as unsafe. I understand it was rebuilt because of the contention made that the road upon the island with which it connected had become a highway by dedication. If such be the fact it falls in the same category as the Sylvan Beach bridge and the same rule applies, namely, the local authorities are obligated to maintain the same. If, on the other hand, it is not a part of the highway system, but connects up private roads upon the island the duty of maintaining the same is incumbent upon the owner of the island.

So in the case of the Toll Road bridge, if the bridge or bridges in question are bridges connecting up the public highway I think the duty of maintenance and repair rests with the local authorities.

With respect to the Cayuga inlet bridges, unless some special statutory provision exists imposing upon the State the duty of maintaining and repairing these bridges the burden of so doing rests with the city of Ithaca. I believe that some or all of these bridges were constructed prior to April 20, 1839, but I believe that it was not until a later date that the Cayuga inlet became a part of the canal system. I think that the Legislature has from time to time made provision for the repair of these bridges. I will in the near future look into the history of these bridges and advise you further.

In writing the foregoing I have not overlooked the provisions of sections 129 and 130 of the Canal Law, added by chapter 472, Laws of 1917. It may be argued with some force that the Legislature in adopting that act assumed that it was incumbent upon the Superintendent of Public Works to maintain and repair bridges spanning the improved canal system of the State. But however that may be, the Legislature did not by that act assume the burden of so doing or impose it upon the Superintendent of Public Works or other State officer. It left the burden of maintaining such bridges where they rested independent of that act.

Very truly yours,

CHARLES D. NEWTON,

Attorney-General.

PUBLIC OFFICERS LAW, SECTION 11 — BOND OF SCHOOL COLLECTOR.

Where the bond of a school collector is required by law, and the surety thereon is a fidelity or surety corporation, and the cost of such a bond does not exceed one per centum of the sum required in the undertaking so given pursuant to law, the expense of procuring such a bond is a proper charge against the political subdivision of the State for which said collector was elected or appointed.

Inquiry is made as to who should pay the premium on the bond required of the school collector conditioned for the faithful performance of his duties as such, when such bond is obtained from a surety or bonding company.

Section 11 of the Public Officers Law apparently applies to the subject matter of your inquiry. Said section reads in part as follows:

“§ 11. Official undertakings. Every official undertaking when required by or in pursuance of law, to be hereafter executed or filed by any officer, shall be to the effect that he will faithfully discharge the duties of his office and promptly account for and pay over all moneys and property received by him as such officer, in accordance with law, or in

default thereof, that the parties executing such undertaking, will pay all damages, costs and expenses resulting from such default not exceeding a sum, if any, specified in such undertaking. * * * If the surety on an official undertaking of a state or local officer, clerk or employe of the state or a political subdivision thereof or of a municipal corporation be a fidelity or surety corporation, the reasonable expense of procuring such surety, not exceeding one per centum per annum upon the sum for which such undertaking shall be required by or in pursuance of law to be given, shall be a charge against the state of (or) political subdivision or municipal corporation respectively and for which he is elected or appointed * * *."

The facts upon which the liability of the State, political subdivision thereof or municipal corporation depend to pay for the bonds of its officials or employees are that the bond is required by law of the official or employee; that the surety on the bond is a fidelity or surety corporation and that the amount of premium does not exceed one per centum per annum upon the sum for which such undertaking shall be required.

If the bond of the school collector mentioned by you is required of him by law, and the surety thereon is a fidelity or surety corporation and in an amount does not exceed one per centum of sum required in the undertaking so given pursuant to law, the expense of procuring such bond is a proper charge against the political subdivision of the State for which said collector was elected or appointed.

September 16, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO TRACY B. SMITH, *Rochester, N. Y.*

I. DUNKIRK, CITY OF — EMINENT DOMAIN — POWER LIMITED.

The city of Dunkirk has no power, under its present charter, to enter upon private property, lying outside the city limits, and to condemn the same for water supply purposes.

II. DUNKIRK, CITY OF — POWER TO PURCHASE LAND FOR WATER SUPPLY PURPOSES.

The city of Dunkirk has power, under its charter, to purchase land lying outside the city limits for water supply purposes. If the lands required cannot be purchased to the advantage of the city, power to condemn such lands should be sought from the Legislature.

In a letter signed by the Secretary to the State Water Power Commission enclosing a copy of a letter addressed to the legal de-

partment of the Conservation Commission, dated August 31st, 1921, and written by the city attorney of the city of Dunkirk, the opinion of the Attorney-General is asked as to whether or not the Board of Water Commissioners of said city have power "to enter lands anywhere in the State of New York and condemn the same for water purposes." The learned city attorney also asks for a list of cases "where lands have been condemned for taking a supply of water from wells." Reduced to its simplest form, the question submitted may be stated as follows:

Has the city of Dunkirk, acting by its board of water commissioners, power to enter upon private lands located outside of the city and to condemn the same for water supply purposes?

The powers granted by the Legislature to the board of water commissioners of the city of Dunkirk are enumerated in section 193 of the charter. (Chap. 538, Laws of 1909.) This board is declared to be a body corporate, and its powers are quite fully enumerated; but neither by section 193 nor by any other provision, as far as appears, has the power to condemn land for any purpose been expressly granted. While the charter has frequently been amended by subsequent legislation, section 193 remains in its original form, and if the power to condemn land for water supply purposes has been granted it must be sought outside of the city charter.

By section 5 of the city charter, after authorizing the city to sue and be sued, to have a common seal, and to take and hold real property, it is further empowered to "possess such other powers as may be conferred by law upon cities and municipal corporations not inconsistent with this act," etc.

By section 20 (subdivision 2) of the General City Law (chap. 26, Laws of 1909), every city is empowered, subject to the Constitution and general laws of the State:

"1. * * * * *

2. To take, purchase, hold and lease real and personal property within and without the limits of the city, and acquire by condemnation real and personal property *within the limits of the city* for any public or municipal purpose.
* * *"

It is clear that, by virtue of this provision, lands outside the city of Dunkirk may not be taken by condemnation proceedings, as that power is to be exercised only upon lands within the limits of the city. The word "take," as used in the first clause of the sub-

division must be held to exclude taking by condemnation proceedings, and to mean the acquisition of title by gift, devise, etc.

The General Municipal Law (chap. 29, Laws of 1909), as its name indicates, is broader in scope than the General City Law. Section 74 thereof reads as follows:

“Condemnation of real property. A municipal corporation authorized by law to take and hold real property for the uses and purposes of the corporation, may, if it is unable to agree with the owners for the purchase thereof, acquire title to such property by condemnation.”

It will be noticed that this section authorizes all municipal corporations to acquire real property by condemnation proceedings, while the General City Law authorizes the purchase of land, whether located within or without the city, but restricts the condemnation of land to that within the city limits. As both of these statutes were enacted by the Legislature of 1909 and became operative on the same day (Feb. 17th), they must be construed together; and section 74 of the General Municipal Law cannot be allowed to enlarge or modify the plain meaning of subdivision 2 of section 22 of the General City Law.

Not only so, but section 74 of the General Municipal Law does not purport to authorize a municipal corporation to condemn land lying outside of the limits of the corporation; and power to condemn land outside of the city of Dunkirk for any purpose will not be implied from the language used in said section 74.

It is elementary that a delegation of the power of eminent domain will be strictly construed against the party seeking to exercise such power; and the extent to which it may be exercised will be limited to the express terms of the statute, unless a broader power is granted by necessary implication.

The conclusion is reached, therefore, that the city of Dunkirk is without power to condemn land, located outside of the city limits, to be used for water supply purposes. If the board of water commissioners shall find it to the interest of said city to seek a water supply beyond the limits of the municipality and if the necessary land and water rights cannot be acquired by purchase under the provisions of the General City Law, above quoted, the city charter should be so amended as to confer upon the board of water commissioners additional power.

Sept. 14, 1921.

CHARLES D. NEWTON,
Attorney-General.

To ELLIS J. STALEY, *State Conservation Commissioner.*

SPECIAL COUNTY JUDGES AND SURROGATES — DOMESTIC RELATIONS LAW,
SECTION 113 — ORDERS OF ADOPTION.

Special county judges and surrogates have power to grant an order of adoption under section 113 of the Domestic Relations Law, when acting for the county judge or surrogate.

You inquire if a special county judge or special surrogate has jurisdiction to grant an order of adoption, when acting for the county judge or the surrogate.

It seems to me to be very clear that the special county judge or the special surrogate in Orange county has jurisdiction to make an order of adoption. Chapter 306 of the Laws of 1849 authorizes the election of local officers to discharge the duties of county judge and surrogate in Orange county. Section 2 of that act was amended by chapter 108 of the Laws of 1851 which provides as follows:

“ Such local officers, so elected, to discharge the duties of county judge (or of county judge and surrogate in those counties where there is no separate officer to discharge the duties of surrogate), shall be designated as special county judge, and such local officers, so elected, to discharge the duties of surrogate in those counties where there shall be a separate officer to discharge the duties of surrogate shall be designated as special surrogate. Such local officers, so elected, to discharge the duties of county judge, or of county judge and surrogate or to discharge the duties of surrogate in those counties where there shall be a separate officer to discharge the duties of surrogate, shall possess all the powers and perform the duties which are possessed and can be performed by a county judge out of court, and any proceeding commenced before any such special county judge, or special surrogate, may be finished by him, or he may by order direct that the same shall be finished by the county judge, or by the surrogate as the case may be.”

This section confers on such officers all the powers and duties which are possessed and can be performed by a county judge out of court.

Article VII of the Domestic Relations Law provides for the procedure for the adoption of children.

Section 113 of that article provides that the judge or surrogate shall make the order allowing or confirming such adoption. This order is a judge's order and not a court order, and is one of the powers that can be exercised by a county judge out of court. An

order of adoption being an order that a county judge could perform out of court, chapter 108 of the Laws of 1851 unquestionably confers power on the special county judge or the special surrogate when acting as such, to make such an order.

September 21, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO ELWOOD C. SMITH, *Monroe, N. Y.*

MOTION PICTURES — CHAPTER 715, LAWS OF 1921, SECTION 6.

Motion pictures to be exempt from license under section 6 of chapter 715 of the Laws of 1921 must be exhibited solely for educational, charitable or religious purposes.

A communication has been received stating that:

“There are several corporations which maintain libraries of films, some of which are made by them but the main portion of which is purchased from film producers. They then classify the films under various heads, such as dramas, comedies, cartoons, industry, history, geography, sociology, science and other classifications. These films, or many of them, have had their day as expressed in the trade, in public places of amusement and are taken and adapted for use in churches. They rent the films for so much a reel to churches and charitable, and sometimes educational institutions.”

A construction is desired of that portion of the last paragraph of section 6 of chapter 715, Laws of 1921, which reads as follows:

“The commission may in its discretion, without examination thereof, issue a permit for any motion picture film intended solely for educational, charitable or religious purposes,”

together with a specific ruling as to whether or not the several corporations maintaining libraries of films as indicated in the portion of your communication, which I have above quoted, come within the provisions of this section of the statute.

It appears from the language of the last paragraph of said section 6 that the picture produced on the film need not be a picture of an educational, charitable or religious nature, but must

be used and intended in the exhibition thereof "solely for educational, charitable or religious purposes." It cannot be used for commercial purposes. If the picture is exhibited under the auspices of a society or body in its nature educational, charitable or religious, without admission fee or if with admission fee, the proceeds thereof to be devoted to some educational, charitable or religious work, then and in such case it matters not what the nature of the picture film may be whether drama, comedy, cartoon, history, sociology, science, etc.

It, therefore, appears to me that any picture, no matter by whom manufactured and placed upon the market which is rented for one of the purposes above set forth and exhibited in the manner above set forth, may be in the discretion of the Commission exhibited under a permit without fee charged by your Commission. I assume that it was the intent of the Legislature in permitting your Commission to grant such permit without fee to make it possible for educational, charitable and religious bodies or societies to rent such picture films at a lesser cost than would otherwise be the case if a license fee were charged.

The application for the granting of this permit, however, should be accompanied by proper affidavit fully settling forth the facts that such picture films are only leased and exhibited under the auspices of educational, charitable and religious institutions or societies, and I might add as a suggestion that the purposes for which the pictures are to be exhibited should be stated in the screen identification made so that the general public might be informed as to whether or not such picture was being exhibited in violation of law.

Notwithstanding the conclusions above set forth, the question as to whether or not you will issue such a permit rests in the discretion of your Commission. The law having vested you with such power of discretion, it, therefore, follows that you may make any rules and regulations deemed necessary to carry out such provision of the statute.

September 22, 1921.

CHARLES D. NEWTON,
Attorney-General.

To GEORGE H. COBB, *Motion Picture Commission.*

TAX LAW, SECTION 4-B—EXEMPTION OF REALTY FOR THREE YEARS—POWERS OF TOWN BOARD—CHAPTER 444, LAWS OF 1921.

The town board of a town, as authorized under section 4-b of the Tax Law, may exempt from local taxation, other than assessments for improvements, for a period of three years, all new buildings, the construction of which shall be commenced before April 1, 1922, and completed within two years after such construction shall have been commenced, where such buildings are to be used exclusively for dwelling purposes; and the exemption granted may be such that lands upon which said buildings shall be constructed shall be assessed as at present, and the exemption granted be to the extent of the value of the buildings erected upon said lands.

The question is asked whether the town board could legally adopt a resolution which would operate to exempt lands in a town from taxation arising out of the erection of new dwellings within the next year, and simply assess the land for a period of three years as of the value assessed prior to the erection of such new dwellings, such proposed exemption to be in force three years.

The particular statute applicable to the subject matter of your inquiry is section 4-b of the Tax Law as amended by chapter 444 of the laws of 1921 which reads as follows:

“§ 4-b. Exemption of new buildings from local taxation. The legislative body of a county, or the legislative body of a city with the approval of the board of estimate and apportionment, if there be one in such city, or the governing board of a town, village or school district, may determine that until January first, nineteen hundred and thirty-two, new buildings thereon, planned for dwelling purposes exclusively, except hotels, shall be exempt from taxation for local purposes, other than assessments for local improvements, during construction and so long as used or intended to be used exclusively for dwelling purposes, or if a building of four stories or more in height, used exclusively for dwelling purposes above the ground floor, provide construction was completed since April first, nineteen hundred and twenty, or, if not so completed, that construction be commenced before April first nineteen hundred and twenty-two, and completion for occupancy be effected within two years after such commencement, or if now in course of construction before September twenty-seventh, nineteen hundred and twenty-two. The provisions of this section shall not be construed to preclude such legislative bodies from granting exemptions which do not exceed the exemption authorized by this section. * * *.”

The exemption authorized by the section of the Tax Law above quoted is confined to taxation for local purposes and does not include assessments levied for local improvements. The property to which such authorized exemption may be extended is to be used or intended to be used exclusively for dwelling purposes. The section of the Tax Law quoted above does not preclude the granting of an exemption from taxation which may not be as extensive as the exemption the said section would authorize.

The town board of your town has the authority under section 4-b of the Tax Law to exempt from local taxation, other than assessments for improvements, for a period of three years all new buildings, the construction of which shall be commenced before April, 1st, 1922, and completed within two years after such construction shall have been commenced, where such buildings are to be used exclusively for dwelling purposes, and the exemption granted may be such that lands upon which said buildings shall be constructed shall be assessed as at present and the exemption granted be to the extent of the value of the buildings erected upon said lands.

September 30, 1921.

CHARLES D. NEWTON,
Attorney-General.

To GUY COMFORT, *Perry, N. Y.*

TAX LAW, SECTION 219-H, SUBDIVISION 7 — CORPORATION TAX.

Method of distribution of corporation tax under amendment of 1921.

We have an inquiry affecting method of distribution of corporation tax.

Under the *Franklin Mills* case, argued recently in the Court of Appeals, it was claimed that school districts could still tax mercantile and manufacturing corporations upon their personal property, because they previously gained nothing from the distribution of the corporation net income tax.

Now, under chapter 447 of the Laws of 1921, effective April 30th, it is provided in subdivision 7, section 219-h of the Tax Law:

“Upon the distribution of such revenues as hereinbefore provided the entire allotment of any town paid to the supervisor thereof shall be further distributed by him as follows:

One-third thereof shall be apportioned among the several school districts in such town in the proportions that the total amount of the assessed valuation of all the real property of such corporations in each of said school districts, respectively, or part thereof in such town, bears to the aggregate assessed valuation of all the real property of such corporations in the entire town, as the same appears upon the last preceding town assessment-roll. The balance thereof shall be retained by him and credited to general town purposes."

It appears under this statute that the Onondaga county treasurer received the county's share of the corporation tax on April 26th, and computed the allotment to the town prior to the time when this amendment took effect. The supervisor of the town received the allotment about five days after the amendment became effective. The question now presented is whether the supervisor should pay over any of this allotment to the school district under the amendment or should proceed as under the old law and keep it all for the town.

The words "upon the distribution of such revenues as hereinbefore provided" give color to a claim that the amendment is not effective in this case. I cannot say that the question is free from doubt. Nevertheless, I am of the opinion that because some municipalities have expeditiously obtained their taxes the school districts should not suffer. We must try to give the statute uniform effect, because it is a general statute applicable to all municipalities alike.

I am of the opinion that beginning April 30, 1921, school districts are entitled to their share of this tax, and therefore the supervisor of the town of Geddes, Onondaga county, should give the school district its allotment.

October 5, 1921.

CHARLES D. NEWTON,
Attorney-General.

To FRANK B. GILBERT, *State Education Department.*

CHAPTER 907, SECTION 7, LAWS OF 1920 — TROY-COHOES BRIDGE —
DESTRUCTION — INSURANCE.

Laws 1920, chapter 907, section 7 — moneys paid to the city of Troy pursuant to the stipulations contained in a policy of fire insurance on account of the fire which destroyed a bridge connecting the city of Troy and the city of Cohoes, were not moneys recovered as damages for the destruction of the bridge, within the contemplation of section 7 of chapter 907 of the Laws of 1921, and said moneys so paid belong entirely to the city of Troy.

The Superintendent of Public Works asks for an interpretation of section 7 of chapter 907 of the Laws of 1920 with respect to the application of said section to moneys in the hands of the city of Troy received by the city of Troy as the avails of a certain insurance policy issued at the request of the county of Rensselaer, insuring as a risk the Troy and Cohoes bridge against loss by fire, the premium upon which policy was paid by the city of Troy, was duly received.

It appears that the county of Rensselaer, at the request of the city of Troy, took out a policy of insurance insuring against loss or damage by fire the Cohoes-Troy bridge, wherein the Commercial Union, British-American and L. L. Globe Insurance companies were the insurers, and the total amount of the policy was \$50,000. The bridge described in the policy of insurance was destroyed by fire in March, 1920, and subsequent to the fire there was paid, or at least received by the city of Troy as the proceeds of said policy, \$22,712.69.

The bridge destroyed by fire was acquired pursuant to chapter 547 of the Laws of 1913, by the terms of which said statute the sum of \$100,000 was appropriated for the purpose of paying the State's share of the expense of acquiring the property of the Cohoes and Lansingburgh Bridge Company owning the bridge crossing the Hudson river between the cities of Troy and Cohoes, between the counties of Albany and Rensselaer, said bridge to be acquired pursuant to the provisions of section 263 to section 267 of the Highway Law.

Sections 263 and 264 of the Highway Law, referred to in the statute above mentioned, defined the preliminary steps necessary for the acquisition of bridges and the abolition of toll bridges. Section 265 of the Highway Law provides for the acquisition of the said bridge upon proceedings instituted by the Attorney-General after the preliminary steps necessary therefor have been taken. Section 266 of the Highway Law defines the method in which the expense of the acquisition of such toll bridges shall be met, and in substance provides that one-half of the expense shall be borne by the counties in which the toll bridge is situated, but provides that the amount so paid by the counties may be apportioned so that 35 per centum of such cost shall be a general county charge and 15 per centum thereof shall be a charge upon the towns or cities in which the toll bridge is situated. It was further provided that in case a toll bridge was located in two counties, 50 per centum of the expense to be borne by the county should be apportioned between them on the basis of their assessed valuation, and the 15 per centum

should be apportioned by the board of supervisors upon the towns and cities in the same manner.

The bridge between the cities of Troy and Cohoes that had been destroyed by fire in March, 1920, had been acquired by the State pursuant to chapter 547 of the Laws of 1913, upon proceedings had in conformity with the section of the Highway Law above mentioned. Upon it being so acquired, the title to the bridge remained in the State. Its destruction by fire would necessarily be followed by its replacement as a matter of public necessity, and precedent had established the fact that such replacement would entail an assessment upon the city of Troy of a proportionate share of the expense of such replacement. The liability to contribute to the cost of the replacement of this bridge, in the event of its destruction by fire, was based upon a contingency which was a proper and legal risk of every insurance company. It is true that the title to the bridge was in the State of New York, but the liability to share the cost of replacement, in the event of the destruction of the bridge by fire, could be reasonably deemed to be a certain one in the event of a fire, and it was a matter for the insurance company to determine whether the risk of this contingency was one that they were willing to accept. The acceptance of this risk by the insurance companies, and the payment of the loss under the policy by the insurance companies, was in the nature of the execution of a contract and the damages paid the discharge of a debt in contract, the insurance company in no way being liable for the destruction of the bridge in question.

The Legislature in 1920, for the purpose of providing for the reconstruction of the bridge so destroyed by fire, enacted chapter 907 of the Laws of 1920. Section 1 of said act authorized the Superintendent of Public Works to reconstruct and rebuild the bridge crossing the Hudson river, connecting the cities of Troy and Cohoes, in accordance with plans and specifications prepared and furnished by the State Engineer and Surveyor. Section 3 of said act provided that 50 per centum of the expense incurred in such construction should be borne and paid by the State and 35 per centum of such expense should be borne by the counties of Albany and Rensselaer, to be apportioned between them on the basis of their assessed valuation, and 15 per centum of said expense should be borne by the cities of Troy and Cohoes, to be apportioned between them on the basis of the assessed valuation. Section 6 of said act authorized the Commissioner of Public Works to provide for the improvement and reconstruction between the tracks of any

street surface railroad upon such bridge, the rails of such tracks and two feet in width outside of such tracks, said work to be done and performed at the same time as the general work done or performed in the reconstruction of said bridge. It was further provided in said section 6 that the Superintendent of Public Works should, upon the completion of the work, determine the cost of improving and reconstructing the roadway within said railroad space and certify the cost of the same to the common councils of the cities of Troy and Cohoes. The common councils of these respective cities were required each to levy one-half of such cost of improvement and reconstruction within such railroad space upon the property of the company operating such railroad within their respective cities in the same manner as the expense for local improvements was assessed and collected. After such cost for such railroad improvement had been collected, the amount thereof was to be divided and paid to the State and municipalities bearing the expense of the work of construction of the bridge as a whole, according to the percentages provided in section 3 of the act which was first noted above; 50 per centum to the State, 35 per centum to the counties of Albany and Rensselaer, to be apportioned between them on the basis of their assessed valuation, and 15 per centum to the cities of Troy and Cohoes, to be apportioned on the basis of their assessed valuation. Section 7 of said act reads as follows:

“§ 7. Any money recovered for damages for the destruction of a bridge which the work herein authorized is intended to replace shall be divided and paid in the manner provided in the preceding section for the distribution of money collected from a railroad company.”

The manner provided in the preceding section for the distribution of money collected from a railroad company was simply the manner or ratio in which the entire cost of the bridge was to be borne by all the parties benefited thereby as outlined in section 3 of said act, the substance of which has been referred to hereinbefore. At the time of the destruction of the bridge in question the title thereto was vested solely in the State of New York. To assume that said section, by its provisions, would operate to compel the city of Troy to apply the avails of the policy of insurance issued to the county of Rensselaer at the request of the city of Troy, would imply that the Legislature intended that the city of Troy was to bear a proportionate share of the expense of the construction of said bridge greater than that share or proportion defined in section 3 of the act. Section 3 of the said act spe-

cifically provides that the city of Troy shall assume and pay its proportionate share of 15 per centum of the cost of said bridge, based on the relative ratio of the assessed valuation of the cities of Troy and Cohoes. The intent of the Legislature as to how the expense of this new bridge should be borne is clearly expressed. The moneys paid to the city of Troy pursuant to the provisions of the fire insurance policies is now the separate property of the city of Troy, and the payment of any part of said moneys towards the cost of this bridge, in addition to a proportionate share of the 15 per centum which the act itself states the city of Troy shall pay, would contravene the evident intent of the Legislature as to how the expense of the cost of said bridge should be shared, as expressed in section 3 of said act. The title to the bridge being in the State of New York, the city of Troy could maintain no action to recover damages for the destruction of said bridge. The moneys paid pursuant to the terms of the policies of insurance were not so paid by reason of the fact that the insurance companies were obligated by law to respond in damages for the destruction of said bridge, or by reason of the fact that any act or omission on their part contributed to the destruction of said bridge. The moneys now in the hands of the city of Troy, received pursuant to the insurance contract mentioned, were not moneys recovered as damages, but were moneys received in discharge of a debt in contract, and hence we are of the opinion that the proceeds of the policy of insurance which was placed on the old bridge by the county of Rensselaer, for which the premiums were paid by the city of Troy, belong wholly to the city of Troy, and said city of Troy is not required under the provisions of section 7 of chapter 907 of the Laws of 1920, to apply said moneys in the manner provided by said section 7 of said act.

October 7, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO CHARLES L. CADLE, *State Superintendent of Public Works.*

SECTION 130 OF THE VILLAGE LAW—LIMITATION OF INDEBTEDNESS.

Villages may incur any amount of indebtedness to provide for water supply. Amount to be raised must be authorized by a proposition.

Your inquiry in relation to the limitation of indebtedness that may be incurred for the construction of a municipal water plant, and as to the manner of raising such moneys, has been received.

In reply thereto I beg to advise that section 130 of the Village Law, relating to the limitation of indebtedness which a village may incur, excludes obligations for supply of water. Therefore, a village may incur any amount of indebtedness to provide for the water supply. The amount to be raised, however, for such purpose must be authorized by a proposition adopted at an election, as provided in section 128 of the Village Law.

It would seem necessary in order to empower the board to raise the \$10,000 needed to complete the water supply that a proposition will have to be submitted and adopted by the electors. Such proposition should specify as to how the money should be raised as provided in section 128 of the Village Law.

October 6, 1921.

CHARLES D. NEWTON,
Attorney-General.

To CARROLL A. THOMPSON, *Old Forge, N. Y.*

GENERAL BUSINESS LAW, ARTICLE VII — PENAL LAW, SECTION 1897 —
PRIVATE DETECTIVES.

Private detectives licensed as provided in the General Business Law must procure a permit under section 1897 of the Penal Law to be entitled to carry concealed weapons.

Inquiry is made whether it is necessary for a private detective, duly licensed as provided by article 7 of the General Business Law, to secure a license to carry and possess dangerous weapons.

Section 1897 of the Penal Law is applicable to all persons except officers and persons mentioned in the last section thereof. Private detectives are not specifically mentioned, nor are they peace officers within the definition of that term as defined in sections 154 and 960 of the Code of Criminal Procedure.

I am, therefore, of the opinion that a private detective must secure a license as provided in section 1897 of the Penal Law to be lawfully entitled to carry a concealed weapon.

October 8, 1921.

CHARLES D. NEWTON,
Attorney-General.

To L. J. KELLY, *Astoria, L. I.*

TOWNS — PUBLIC REST ROOMS.

The Legislature has not authorized towns to raise money by taxation for the establishment and maintenance of public rest rooms.

You inquire if the taxpayers of a town are entitled to have submitted to the electors the proposition to raise money by taxation for the establishment and maintenance of a public rest room.

There is no authority in the Town Law for submitting such a proposition.

A town is a municipal corporation created by the Legislature and has only such powers as are expressly conferred upon it by law, and such implied powers as are necessarily inherent for the proper functioning of such corporation.

The Legislature has not, so far as I have been able to find, declared that the establishment and maintenance of a rest room to be a municipal proposition, and in the absence of an expressed authority conferred upon towns by the Legislature I am of the opinion that it would not be lawful to raise by taxation money to be appropriated for such a use even with the consent of the taxpayers.

October 17, 1921.

CHARLES D. NEWTON,
Attorney-General.

To ALFRED S. ARMSTRONG, *Clyde, N. Y.*

REFERENDUM — USE OF.

The use of the referendum is only authorized where a provision has been made therefor in an express enactment of the Legislature, and no authority exists to submit questions by way of referendum to voters by way of implication.

The corporation counsel of Rome requests an opinion as to the legality of the submission to the voters of the city of Rome, upon the ballot to be voted at the general election this coming November, of the question "Shall moving pictures be permitted in the city of Rome on the first day of the week" was duly received.

The question involves a decision as to whether or not a certain specific use of the referendum is authorized by law. The legal question so involved in your inquiry was passed upon by the Attorney-General in 1917, where it was decided that the use of the referendum was only authorized where a provision was made therefor in an express enactment of the Legislature and that no

authority to submit questions by way of referendum could be assumed by implication. This opinion of the Attorney-General was based upon the opinion of the Court of Appeals in the case of *Mills v. Sweeney*, 219 N. Y., 213.

In the absence of any express statute authorizing the submission of the question mentioned above to the voters of the city of Rome in the manner indicated, such submission of the question is illegal. The possibilities that in one way or another the validity of an election or the title to an office filled as a result of an election may be submitted to the office of the Attorney-General for a review has resulted in the adoption by the Attorney-General of a policy of referring the choice of the particular remedy or procedure to correct an unauthorized practice in connection with an election to the local authorities immediately concerned therewith.

October 17, 1921.

CHARLES D. NEWTON,
Attorney-General.

To ARTHUR S. EVANS, *Rome, N. Y.*

TOWN LAW, SECTION 53 — CORPORATIONS.

Only electors are qualified to vote at town meetings. Corporations have never been granted the right to vote either for a town officer or on town propositions.

A letter in relation to the right of the officers of a corporation to vote on propositions to raise money by tax has been received.

In reply thereto I respectfully advise that the officers of a corporation or any of its directors or representatives are not qualified to vote on a proposition to raise money by tax on behalf of the corporation.

Section 53 of the Town Law provides that only "electors" who own property are entitled to vote upon a proposition to raise money. A corporation is not an elector but merely a legal entity having only such rights and powers as are conferred by statute and its charter. The Legislature has never granted to corporations, as such, the right either to vote for an officer or upon propositions to raise money or incur obligations.

October 18, 1921.

CHARLES D. NEWTON,
Attorney-General.

To H. ROBINSON, *Lindenhurst, L. I.*

CHILD WELFARE LAW — SUFFOLK COUNTY.

The statute giving the Suffolk County Board of Child Welfare jurisdiction over children committed to institutions prior to the creation of the board is not unconstitutional.

A communication in relation to the authority of the Suffolk County Board of Child Welfare, under chapter 696 of the Laws of 1921, has been received.

It is stated that prior to the enactment of chapter 696 certain children were committed by justices of the peace of Suffolk county to the New York Catholic Protectory and the Children's Village, for indefinite terms, to be discharged at the discretion of those institutions.

Inquiry is made whether under section 4 of chapter 696, the board of child welfare has authority to remove from those institutions the children so committed prior to the organization of said board.

Section 4 of chapter 696 of the Laws of 1921 provides as follows:

"Discharge of parole of children. The board, in its discretion, and after proper investigation, may remove, discharge or parole any child whom the said board has committed to any institution or placed in any family home, and no other law or charter of any private institution shall prevent the board from exercising this power. The power and responsibility of the board shall continue during the child's minority unless such child is legally adopted or returned to the parents."

Paragraph 2 of section 9 of said chapter provides:

"All children then in private institutions, or family homes through commitment or placement by any poor law official, court or magistrate shall, upon public announcement by the board that it has begun to exercise the authority and duties vested in it by this act, have the status of children accepted by or committed to the board and by it placed in such respective institutions or family homes."

There would seem to be little question that the second paragraph of section 9 is retrospective and was intended to confer upon the Suffolk County Board of Child Welfare the same jurisdictional control over all children committed to private institutions or family homes prior to the organization of the board, as

the statute gives to the board in respect to those children committed to the board after the statute took effect.

The question presented is whether the provision of the act which gives to the board jurisdiction over certain children committed prior to its enactment, being retrospective, is an *ex post facto* law, and, therefore, in violation of the Constitution of the United States.

As I view the provision in question, it does not abridge or interfere with any vested rights of the children or of the institution, nor does it increase the punishment. Its effect is to vest in the Suffolk County Board of Child Welfare instead of in the private institution to which they have been committed, discretion to determine whether certain children committed from that county should be discharged or paroled.

I think it is clear that the Legislature had power to make such a substitution. It is an act transferring jurisdiction, and, while retroactive in its character, it is not *ex post facto*, within the meaning of the Constitution.

October 21, 1921.

CHARLES D. NEWTON,
Attorney-General.

To CHARLES H. JOHNSON, *State Board of Charities.*

CORPORATIONS — USE OF MORE THAN ONE NAME — EFFECT OF MERGER.

Where one corporation has been merged by another, pursuant to section 15 of the Stock Corporation Law, the possessor corporation may not continue to use the name of the merged corporation, unless it decides to adopt that name as its own and relinquish the right to use the name under which it was incorporated.

Inquiry is made whether in the case of a merger under section 15 of the Stock Corporation Law the possessor corporation can use the name of the merged corporation as well as its own name.

It is well settled that a corporation can only do business in its own name. As is stated in *Scarsdale Publishing Co. v. Carter* (63 Misc. 274), "the first requisite in the certificate of incorporation is 'the name of the proposed corporation.' (Business Corporation Law, § 2, subd. 1.) The name, therefore, is essential to its existence." The name of a corporation is that attributed which serves to identify. Where a corporation is merged its identity is lost in that of the possessor corporation, and the necessity for distinguishing it as a legal entity no longer exists.

As you have already remarked, the provisions in section 13 of the Stock Corporation Law to the effect that the possessor corporation shall become possessed of and enjoy the property, rights, privileges and franchises of the merged corporation and shall, through its board of directors, manage and control the same, are coupled with the condition that this shall be done "in its name."

While a possessor corporation may, under section 6 of the General Corporation Law, have the same name as that of a merged corporation, it will be noted that the authority of said section is limited where more than one corporation has been merged to the use of the name of "one of the corporations" to whose franchise the possessor corporation has succeeded.

In my opinion to permit a corporation to do business under more than one name would lead to endless confusion. I, therefore, conclude that upon a merger under section 15 of the Stock Corporation Law, the possessor corporation may not continue to use the name of the merged corporation unless it decides to adopt that name as its own and relinquish the right to use the name under which it was incorporated.

The right to use a trade name or names in connection with the manufacture or sale of merchandise as distinguished from the name by which the corporate entity shall be known, of course, presents a different proposition.

October 22, 1921.

CHARLES D. NEWTON,
Attorney-General.

To F. H. DECKER, *Syracuse, N. Y.*

VETERAN'S PREFERENCE — CIVIL SERVICE LAW — SECTION 21-B AS ADDED BY CHAPTER 702, LAWS OF 1921.

Paragraph C, section 21-b of the Civil Service Law, as added by chapter 702, Laws 1921, is unconstitutional, being in conflict with article 5, section 9 of the State Constitution.

Inquiry is made with reference to chapter 702 of the Laws of 1921, commonly known as the Duell Veteran's Preference Bill, and being section 21-b of the Civil Service Law.

In *The Matter of the Application of Charles Barthlemess et al., Appellants, v. Morris Cukor et al.*, composing the Municipal Civil Service Commission of the City of New York, Respondents, reported in 231 N. Y. page 435, the constitutionality of chapter 282 of the Laws of 1921, which was an amendment to subdi-

vision 7 of section 245 of the Military Law, was brought into question. The Court of Appeals unanimously held that such law (chapter 282 of the Laws of 1920) was in violation of article 5, section 9 of the Constitution of the State, which reads as follows:

"Civil service appointments and promotions. Section 9. Appointments and promotions in the civil service of the State, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations which, so far as practicable shall be competitive; provided, however, that honorably discharged soldiers and sailors from the army and navy of the United States in the late civil war, who are citizens and residents of this State, shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment or promotion may be made. Laws shall be made to provide for the enforcement of this section."

Upon the authority of the above case, this office held in an opinion to the State Civil Service Commission, dated July 26, 1921, that paragraph "c" of section 21-b of the Civil Service Law, giving preference in appointment in the civil service to "disabled veterans" is unconstitutional, being in conflict with article 5, section 9 of the State Constitution.

October 25, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO THOMAS L. BARRETT, *Dannemora, N. Y.*

GENERAL BUSINESS LAW, SECTION 32 — PEDDLERS' LICENSES — VETERANS —
COUNTY LAW — SECTION 161-A — RECORDING CERTIFICATES OF HONORABLE
DISCHARGE.

A veteran's peddlers license may be issued under section 32 of the General Business Law upon presentation of a copy of an honorable discharge certified by a county clerk as being a true copy of such discharge as recorded in his office.

Section 32 of the General Business Law provides in part as follows:

"Section 32. Licenses to Soldiers, Sailors and Marines. Every honorably discharged soldier, sailor or marine of the military or naval service of the United States, who is a resi-

dent of this state and a veteran of *either the civil war, the Spanish-American war or the World war*, or who shall have served beyond sea, *and the widow of any such veteran if she is a resident of the state*, shall have the right to hawk, peddle, vend and sell by auction his own goods, wares or merchandise or solicit trade within this state, by procuring a license for that purpose to be issued as herein provided.

It further provides that, "on presentation to the clerk of any county in which any soldier, sailor or marine may reside of a certificate of honorable discharge from the army or navy of the United States" by a person referred to in the above quoted section, the county clerk shall issue, without cost, to such person a license certifying him or her to be entitled to the benefits of this law.

Chapter 214 of the Laws of 1920, being "An Act to amend the County Law, in relation to the recording and effect of certificates of the honorable discharge of certain soldiers, sailors and marines provides as follows:

"Recording Certificates of Honorable Discharge. A certificate, issued since April sixth, nineteen hundred and seventeen, of the honorable discharge of any soldier, sailor or marine from the military, naval or marine service of the United States, may be recorded in any county, in the office of the county clerk. It shall be the duty of the county clerk to record any such certificate, upon presentation thereof. This section also applies to the county of New York. *For any purpose for which such original honorable discharge may be required in the state of New York, a certified copy of such record shall be deemed sufficient and shall be accepted in lieu thereof.*

This act shall take effect immediately."

It was evidently the intention of the Legislature to make provision for the record of original honorable discharges so that the same might be perpetuated in a legal way. Under this law a certified copy of the record can properly be accepted in lieu of the original discharge, when the original has been lost, destroyed, stolen or badly mutilated in any instance, or for any purpose where the original discharge might be required in the State of New York.

I am of the opinion that you are authorized under chapter 214 of the Laws of 1920 to issue a peddler's license under section 32 of the General Business Law upon the presentation to you of a copy of an honorable discharge duly certified by the county clerk as being a true copy of such discharge as recorded in his office.

While it is possible that an occasional abuse of this practice may occur, this law should not be construed in such a light as to work an injustice to many who will be rightly entitled to its benefits. Besides there are criminal penalties provided for improper application for or use of a peddler's license under section 32 of the General Business Law.

November 2, 1921.

CHARLES D. NEWTON,
Attorney-General.

To GEORGE T. BRADT, *Schenectady, N. Y.*

BANKING LAW, SECTION 267 — SAVINGS BANKS — BUYING OF MORTGAGE FROM A TRUSTEE.

The buying of a mortgage by a savings bank from a trustee thereof is as much within the prohibition of subdivision 2 of section 267 of the Banking Law as lending money to and taking mortgages from a trustee.

Inquiry is made as to whether an assignment of a mortgage by a trustee of a savings bank to the bank of which such assignor was a trustee, where such assignment was made after the mortgagor in said mortgage had made application to the bank which was assignee of the mortgage so assigned for a mortgage loan, and upon such application so made, an investigation was had and the loan applied for duly approved, and the assignment of the mortgage being thereupon executed and delivered for the purpose of effecting the loan for which application was so made, and such assignment in no sense being the carrying out of any agreement on the part of the bank and the trustee of a contract for the purchase of the mortgage so assigned, came within the provisions of the banking law prohibiting certain transactions between trustees of savings banks and the banks of which they were trustees, was duly received.

The transaction stated as far as the intent of all the parties concerned therewith was a loan to an applicant therefor, made in the due course of the business of the bank, and due attention was given, before the application for the loan was approved, to ascertain that the security for the loan was legally adequate and the bank's interests in the transaction were carefully safeguarded. The method of the bank in obtaining its security for the loan involved the assignment to the bank of an existing mortgage covering the property offered by applicant for the loan as security therefor, and thus obviated the necessity of the execution and delivery of a new mortgage. No legal objection could be offered to the method of effecting

the loan so applied for in general. The owner of the mortgage of which such assignment was desired was a trustee of the savings bank making the loan. The assignment of the mortgage, therefore, resulted in the transfer by a trustee of a savings bank of a security to the bank of which he was trustee, and in consideration therefor the payment out of the funds of said savings bank to said trustee the agreed value of the mortgage and bond accompanying the same so assigned.

The transaction of which the assignment was a necessary incident was in itself perfectly legitimate; the method applied to complete this particular transaction and secure the loan applied for was subject to the criticism that it came within the provisions of section 267 of the Banking Law, wherein certain restrictions are placed upon the trustees and officers of savings banks. Said section 267 of the Banking Law reads in part as follows:

"2. Neither a trustee nor an officer of a savings bank shall

(a) For himself or as agent or partner of another, directly or indirectly use any of the funds or deposits held by the savings bank, except to make such current and necessary expenses as are authorized by the board of trustees.

* * * * *

(e) For himself or as agent or partner of another, directly or indirectly borrow any of the funds or deposits held by the savings bank. * * *."

In the case of *Paine v. Irwin*, 59 How. 316, it was held that buying mortgages from a trustee was as much within the foregoing prohibition of the statute as lending money to and taking mortgages from trustees.

On the facts admitted it would appear that the assignment of the mortgage mentioned was prohibited under the provisions of section 267 of the Banking Law.

November 3, 1921.

CHARLES D. NEWTON,
Attorney-General.

To JOHN J. BEATTIE, *Warwick, N. Y.*

POOR LAW, SECTION 25 — QUARANTINE — INDIGENT PERSONS.

A person possessed of substantial property is not an indigent person or entitled to temporary relief under section 25 of the Poor Law by reason of the fact that such person and family may, for a temporary period of time, be precluded from following their vocations due to quarantine regulations.

Inquiry is made as to whether supplies furnished to a certain family under quarantine for diphtheria constituted a proper charge against the town of which the person so quarantined was a resident, was duly received.

From the letters enclosed with the letter sent by you making the aforesaid inquiry, it appears that the person quarantined was possessed of real estate of substantial value.

A local board of health and every local health officer under section 25 of the Public Health Law is charged with the duty of guarding against the introduction of infectious and contagious diseases in their respective health districts and by said section are commanded to exercise proper and vigilant medical inspection and control of all persons and things infected with or exposed to such diseases, and to provide suitable places for the treatment and care of sick persons who cannot otherwise be provided for.

Section 35 of the Public Health Law reads as follows:

“§ 35. Expenses, how paid. All expenses incurred by any local board of health in the performance of the duties imposed upon it or its members by law shall be a charge upon the municipality, and shall be audited, levied, collected and paid in the same manner as the other charges of, or upon, the municipality are audited, levied collected and paid.”

* * * * *

The legal responsibility of a citizen to provide for himself and for those whom, under the law, he is bound to maintain and support, attaches at all times and the mere fact that a citizen may, under the provisions of the Public Health Law, be a proper subject for the quarantine regulations of a local board of health or the health officer thereof, does not, of itself relieve such a citizen of this responsibility. The cost of the maintenance and support of a person and the family of a person under quarantine is not necessarily an expense of such quarantine. The expenses of a quarantine, proper, are expenses of the board of health and are therefore legitimate town charges.

There may be circumstances surrounding a person under quarantine that might serve to place the burden of the maintenance and support of such a person and his family temporarily upon the town.

There is, in this State, a distinction made between two classes of persons who may properly be cared for at public expense. The first class are those generally termed paupers, persons having no property or capacity to provide for themselves, being absolutely

destitute. The second class are persons who have no property but have the capacity to and who in fact do provide for themselves and families, but are dependent solely upon their daily labor and when from any cause, their ability to labor ceases from sickness or other causes beyond their control, they are placed in a situation where temporary relief from the poor authorities is necessary for their support and the support of their families. The latter class mentioned are embraced generally, when applying for relief, under the definition of indigent persons. (*People ex rel. Town of Blenheim v. Board of Supervisors*, 121 N. Y. 345.)

Section 23 of the Poor Law has in mind the relief of the class properly termed indigent persons whose urgent demand is for temporary relief, said section reading as follows:

“§ 23. Temporary relief to persons who cannot be removed to almshouse. If it shall appear that the person so applying requires only temporary relief, or is sick, lame or otherwise disabled so that he cannot be conveniently removed to the county almshouse, or that he is a person who should be relieved and cared for at his home under article six of this chapter, the overseer shall apply to the supervisor of the town, who shall examine into the facts and circumstances, and shall, in writing, order such sum to be expended for the temporary relief of such poor person, as the circumstances of the case require * * *.”

Article six referred to in the section last quoted has to do with the relief of soldiers, sailors and marines.

In the case of *Bellows v. Board of Supervisors*, 73 Misc. 566, the amount of bill for supplies furnished to person under quarantine, ordered by board of health was held to be a proper town charge under the facts of that case. The facts in the case disclosed that the person under quarantine was afflicted with smallpox, had no property, was dependent for his own support and the support of his family upon his daily labor, had never been a public charge, and when acquainted with the nature of his illness, stated to the health physician that he would be unable to care for himself and his family during his illness and at the suggestion of the attending physician made a written request that relief be provided until he should recover. The person quarantined in this case was an indigent person and relief afforded to him could be afforded temporarily under section 23 of the Poor Law above set forth. This case is in no particular an authority for charging the expenses

of maintenance of a person under quarantine and of his family, where such a person is possessed of real estate of substantial value, upon the town in which such person may reside.

Furthermore, section 57 of the Poor Law impliedly forbids the application of town funds to the maintenance and support of persons possessed of property of substantial value. Said section reads as follows:

"§ 57. Recovery from pauper who has property. If it shall at any time be ascertained that any person, who has been assisted by or received support from any town, city or county, has real or personal property, or if any such person shall die, leaving real or personal property, an action may be maintained in any court of competent jurisdiction, by the overseer of the poor of the town or city, or the superintendent of the poor of any county which has furnished or provided such assistance or support, or any part thereof, against such person or his or her estate, to recover such sums of money as may have been expended by their town, city or county in the assistance and support of such person during the period of ten years next preceding such discovery or death."

It is a legitimate inference from the section of the Poor Law last quoted that it was never intended by the operation of any statute to apply the funds of a town to the support of a person, against whom the town would have an immediate right of action to recover the sums so applied.

The person under quarantine mentioned in your letter, possessing real property of an assessed value of \$3,500, being neither a poor person or a person who, under the Poor Law, would be entitled to temporary relief, I am of the opinion that the cost of the maintenance and support of such a person during the period of quarantine is not a proper town charge.

The letters accompanying your inquiry are herewith returned for your files.

November 3, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO JOHN A. SMITH, M. D., *State Health Department.*

BOARDS OF SUPERVISORS — USE OF STATE LABORATORIES.

The several counties may avail themselves of the use of State laboratories.

The State Hospital Commission makes inquiry as to the legality of a contract proposed to be entered into between the board of supervisors of the county of St. Lawrence and the St. Lawrence State Hospital, whereby the said county may make available for the use of the residents of said county the laboratory of the St. Lawrence State Hospital. These negotiations are to be consummated under chapter 673 of the Laws of 1921, which reads as follows:

“The superintendent, with the approval of the Commission, may enter into an arrangement with proper municipal or county officials or others under which the laboratory service of the hospital may be made available to municipalities or counties or parts thereof adjacent to the hospital, when in his judgment such an arrangement will be in the interest of public health and not prejudicial to the interest of the institution or its work. He may receive moneys to be applied to extension of laboratory service or in consideration thereof, and expend the same in accordance with the terms of the arrangement entered into as aforesaid, subject to the rules of procedure to be established by the Commission.”

Boards of supervisors are created by section 3, article 27 of the Constitution of the State of New York, and as a result thereof the Legislature has vested the several boards of supervisors, in the exercise of sound discretion, with authority to act under powers that are fairly to be implied from the authority so given them under the Constitution and the statutes.

Section 43 of the County Law provides as follows:

“The board of supervisors of any county, shall have the power, by the vote of a majority of said board, to establish a county laboratory and to appoint a thoroughly trained and competent county bacteriologist to have charge of such laboratory, and such assistants as may be required.”

Section 44 of the County Law provides for the compensation and removal of the bacteriologist, and assistants who may be employed in said laboratory under the direction of the board of supervisors. It is, therefore, clearly evidenced that the board of supervisors of St. Lawrence county has the power by the vote of a majority of said board to establish a county laboratory in

St. Lawrence county. The procedure which must be followed in the creation of this laboratory is not defined, that is, it is not specifically stated that it is obligatory upon them to erect a laboratory, and in so far as they may make available for the use of said county such laboratory, it is reasonable to believe that they are using their best judgment in so doing, all of which would be substantiated in the event that the cost to the county of said laboratory would be less than the expense in erecting and maintaining a laboratory by said county.

It is true that the question of the authority of the board of supervisors to enter into this proposed contract turns upon the intent of the legislature as to the powers vested in the board of supervisors by statutory enactment.

In the case of *Wood v. Supervisors*, 136 N. Y. 403, at pages 410 and 411, the court said, in an opinion unanimously rendered discussing the powers of boards of supervisors:

“Boards of supervisors represent the county in its corporate capacity and have power to bind it to the extent conferred by statute, and when any act of such board is challenged as beyond its power, or not binding upon the county, resort must be had to the specific powers enumerated in the statute which such board may exercise. But in such cases the body is not confined to the exercise of the precise act contained in the grant of power, but, from the nature of the case as well as upon settled principles, it possesses and may exercise such incidental powers, not expressly enumerated or mentioned in the statute, but which are fairly and reasonably necessary and proper in order to give effect to or carry out the powers expressly conferred.”

Again in the case of the *People ex rel. Wakeley v. McIntyre*, 154 N. Y. 628 at page 632, in an opinion unanimously rendered, the court further said:

“The Constitution provides (Art. 3, Section 27) that the legislature shall by general laws confer upon the boards of supervisors of the several counties of the state such further powers of local legislation and administration as the legislature may from time to time deem expedient.

Within the limits of this delegated power, the board of supervisors is clothed with the sovereignty of the state, and is authorized to legislate as to all details precisely as the legislature might have done in the premises.

The evident intent of the framers of the Constitution in permitting the legislature to delegate certain of its powers to the local boards was to carry out a public policy, which assumes that the interests of a particular locality are best subserved by those who are familiar with its affairs.

It would be quite impossible for a board of supervisors to properly legislate in regard to local affairs, if it were not at liberty to resort to those implied powers, within the limits of its jurisdiction, vested in the legislature of the state."

Further, in the case of *Wadsworth v. Board of Supervisors*, 217 N. Y. 484 at page 490, the court again said:

"The board of supervisors of a county is vested with such powers of local legislation and administration as are conferred upon it by the legislature. Its power is co-extensive with the power expressly granted to it, or which is necessarily or reasonably implied from the powers so expressly conferred."

This proposed contract is one that cannot be regarded as unusual in so far as it must require an act of the Legislature authorizing the supervisors to legally consummate this contract, for the reason that they are specially endowed with the power under the statute to establish a laboratory. Further, that in rendering the use of the same available for the benefit of the people generally in the said county, they are, as a matter of law, establishing a laboratory in compliance with the statute. The residents of this county would be in a position to equally share in the benefits derived therefrom. It is reasonable to believe that the expense to the county for the use of this laboratory would be far less than if the laboratory were erected, maintained and supported solely by the county.

I have no hesitation in advising that there is nothing irregular or illegal in the consummation of this agreement.

November 3, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO STATE HOSPITAL COMMISSION.

GENERAL CONSTRUCTION LAW, SECTION 24 — ARMISTICE DAY.

Armistice Day, November 11, 1921, when so proclaimed by the President and Governor is a legal holiday in this State.

Must a county clerk's office be closed November 11th, Armistice Day.

In my opinion this day is a legal holiday.

Section 24 of the General Construction Law, provides:

“Holidays; half-holidays.— The term includes the following days of each year; * * * each day appointed by the President of the United States and the Governor of this state as a day of general thanksgiving, general fasting and prayer or other general religious observances * * *.”

I cannot find that any occasion has heretofore arisen to construe the quoted part of the statute as applicable to other than the general Thanksgiving Day customarily set for the last Thursday of November. However, I have before me the proclamation of the President under date of the 4th of November setting aside Armistice Day as a holiday in memory of those who gave their lives in the late war as typified by the Unknown and Unidentified Soldier, and recommending the Governors of the several States proclaim that the people pause in their usual pursuits as a mark of respect on this solemn occasion. The President recommends that all public and church bells throughout the United States be tolled between 11:45 and noon, and that from noon for two minutes all devout and patriotic citizens of the United States indulge in a period of silent thanks to God for these valorous lives and of supplication for His divine mercy and for His blessings upon our beloved country.

In accordance with these recommendations I understand the Governor to-day will likewise issue a proclamation.

I think there can be no doubt, therefore, that Armistice Day is a day appointed by the President and by the Governor as a day of general religious observances, and also as a day of general thanksgiving and prayer.

I am, therefore, of the opinion that this is a legal holiday within the State of New York, and that the county clerk's office is not required to be kept open.

November 7, 1921.

CHARLES D. NEWTON,
Attorney-General.

To H. H. KENT, *Herkimer, N. Y.*

BANKING LAW — ARMISTICE DAY — NEGOTIABLE INSTRUMENTS.

Negotiable instruments becoming payable on Armistice Day, Friday, November 11, 1921, are not payable until the following Monday, November 14th, except that instruments payable on demand may be presented upon Saturday, November 12th up to twelve o'clock noon, at the option of the holder.

The following question is presented:

"We have had a great many inquiries from various banking institutions as to whether Friday of this week, proclaimed as a holiday, under the title "Armistice Day," is a bank holiday? If so, is it your understanding that inasmuch as the following day is Saturday, under the terms of Section 145 of the Negotiable Instruments Law, any such instrument falling due on Friday cannot be presented for payment until the following Monday?"

It is the opinion of this Department that Armistice Day, November 11th, is a public holiday under the terms of the General Construction Law. An opinion to that effect was rendered last week; consequently, the terms of section 145 of the Negotiable Instruments Law apply to banks. This section provides:

"Sec. 145. *Time of Maturity.* Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due or becoming payable on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday."

I am, therefore, of the opinion that negotiable instruments falling due or becoming payable on Friday, November 11th, are not payable until the following Monday, November 14th; except that instruments payable on demand may be presented upon Saturday, November 12th, up to 12 o'clock, noon, at the option of the holder.

November 9, 1921.

CHARLES D. NEWTON,
Attorney-General.

To GEORGE OVEROCKER, *Deputy, State Banking Department.*

TOWN LAW, SECTION 472.

Section 472 of the Town Law does not confer power upon the town board to enact an ordinance dividing the town into zones.

This office is asked whether the town board of Mamaroneck has authority under section 472 of the Town Law authorizing the town board to enact “* * * and such other and further ordinances not inconsistent with the laws of the towns, the protection of its property, the preservation of peace and good order, the preservation of health, the prevention and extinguishment of fires * * * with such town; * * *,” to divide a town into zones for the purpose of restricting and otherwise regulating the character of the buildings which may be erected therein.

It seems clear to me that the town board is not empowered under section 472 of the Town Law to enact ordinances dividing the town into zones for the purposes enumerated above. The fact that the Legislature has conferred power on cities by chapter 483 of the Laws of 1917, seems to warrant the inference that such power would not exist under a general authority to enact ordinances.

Therefore, in the absence of any statute expressly conferring power on town boards to divide the town into districts for such purposes, such power does not exist.

November 10, 1921.

CHARLES D. NEWTON,
Attorney-General.

To GEORGE W. BURTON, *Mamaroneck, N. Y.*

PENAL LAW, SECTION 1868 — INSURANCE — POLICIES WRITTEN BY
PUBLIC OFFICERS.

Because an insurance policy is a contract, a public officer cannot act as agent for an insurance company in making such a contract upon behalf of the municipality which he serves.

The question you present is controlled by section 1868 of the Penal Law, which provides as follows:

“§ 1868. *Officials not to be interested in sales, leases or contracts.* A public officer or school officer, who is authorized to sell or lease any property, or to make any contract in his official capacity, or to take part in making any such sale, lease or contract, who voluntarily becomes interested individually in such sale, lease or contract, directly or indirectly, except in cases where such sale, lease or contract, or payment under the same, is subject to audit or approval by the commissioner of education, is guilty of a misdemeanor.”

Now an insurance policy is a contract, and it seems to me it is quite clear that a public officer may not profit from the making of a contract in which he participates.

November 10, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO JAMES H. ARNOTT, *Buffalo, N. Y.*

BOXING LAW — DEBTS OF BOXERS.

The State will not sue upon the bond given by a boxing club to recover the debt due a boxer.

There has been before this Department for a considerable period of time the question of the right of persons dealing with boxing clubs to recover their debts upon the bond filed by the club under the requirements of the Boxing Law.

Illustrative cases are those where the Athletic Commission has sent an official or a physician to a club and the club has not paid for the services rendered; where tickets have been printed by a ticket company at the direction of the Commission and the tickets have not been paid for by the club; where the club has contracted debts for merchandise and other general purposes.

Our New York office has given this matter close consideration and we have given the matter further examination to see if it is not possible to work out some means by which creditors could be recompensed. I recognize fully that it is to the interests of boxing, which your Commission is created to foster, if we can compel honest dealing by the clubs under your jurisdiction.

However, I am constrained to take the view that under the late case of *Fosmire v. National Surety Company*, 229 N. Y. 44, the bond is given by the club in order to primarily insure the payment of taxes to the State. At the time the form was drawn and before this case was decided, I tried to make the bond as broad as possible so as to cover all violations of the rules and regulations of the Commission. Let us hope that I have succeeded. Still, this Department and the State Athletic Commission cannot take it upon themselves to sue upon these private debts. The most that I can recommend is that the bond may be regarded as an obligation taken by the State for and on behalf of another under the *Lawrence v. Fox* doctrine.

If the court should so determine, these creditors have as much right to bring the suit as the Attorney-General or the people of the State.

I can, therefore, only state that any one of these creditors is at liberty to test the question in the court by bringing an action in his own name against the Surety Company and Club.

I reach this conclusion after having given the matter very thorough consideration and with an understanding of the various interests and purposes involved. I regret that I can reach no other.

November 10, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO STATE ATHLETIC COMMISSION.

PENAL LAW, SECTION 1142-A — ADVERTISING MATTER TO MEDICAL PROFESSION BY MANUFACTURING CHEMISTS.

Section 1142 of the Penal Law was not intended to, and in fact does not, prohibit the distribution of advertising matter in the form of circulars, by manufacturing druggists and chemists, to the medical profession, wherein their respective products and the therapeutic indications for the use of the same are set forth, where the use of any of such products by the medical profession could not be questioned.

Inquiry is made as to whether a certain descriptive circular, addressed to you, and enclosed with your letter, by reason of the subject contents thereof, came within the prohibition of section 1142-A of the Penal Law, which section prohibits advertising, of the particular description in said section specified, was duly received.

The circular enclosed describes certain synthetic compounds and outlines in some detail the particular advantage arising from the use of said compounds, in the successive stages of the treatment of the infection, wherein the synthetic compounds mentioned are stated to be indicated, on account of their efficacy. The language employed in and the general subject matter of the circular indicate it was prepared for distribution to the medical profession only. It was addressed to you as a physician. The use of the drugs described by the medical profession, for the purposes recommended by the circular would be perfectly legitimate. The question, therefore, resolves itself into an inquiry as to whether a manufacturing druggist is forbidden by the provisions of section 1142-A of the Penal Law, to call to the attention of the medical profession, through the medium of circulars containing descriptive matter, the

merit of any synthetic compound, the use of which, by a member of the medical profession, being entirely lawful; but the therapeutic indications for such legitimate use of said synthetic compounds are in the treatment of some of the particular infections mentioned in section 1142-A of the Penal Law. It is our opinion that section 1142-A of the Penal Law was not intended to and in fact does not prohibit the distribution of advertising matter in the form of circulars, by manufacturing druggists and chemists, to the medical profession, wherein their respective products and the therapeutic indications for the use of the same are set forth, where the use of any of such products by the medical profession could not be questioned. The letter of the Anglo-French Drug Company and the advertising matter accompanying the same, from the contents thereof, having in mind the profession of the person to whom said letter and descriptive circular were sent, do not come within the provisions of section 1142-A of the Penal Law.

The letter of the Anglo-French Drug Company and circular attached thereto are herewith returned for your files.

November 18, 1921.

CHARLES D. NEWTON,
Attorney-General.

To JOSEPH S. LAWRENCE, *U. S. Public Health Service.*

TOWN LAW, SECTION 131 — MEETINGS OF THE TOWN BOARD — MEMBERS OF THE LEGISLATURE HOLDING TOWN OFFICES.

Section 131 of the Town Law is mandatory and requires two town meetings to be held annually at the office of the town clerk. Members of the State Legislature not prohibited from holding any town office.

Inquiry is made whether a supervisor or a town clerk or a justice of the peace can hold at the same time either the office of senator or assemblyman of the district.

In reply thereto beg to advise that there is no statute which specifically forbids a member of the Legislature from holding either of the offices specified above, nor would their duties be incompatible.

I, therefore, advise that there is no objection to a person holding the office of supervisor or town clerk or justice of the peace and that of either senator or assemblyman simultaneously.

Answering your further inquiry in which you ask if it is compulsory for the town clerk to hold the first meeting of the town board in the town clerk's office, beg to advise that section 131 of

the Town Law provides that at least two meetings shall be held annually at the office of the town clerk; one on the Tuesday preceding the biennial town meeting and on the corresponding day in each alternate year. This section is mandatory. All other meetings of the town board may be held at a time and place within the town designated by the board.

See *People v. Watkins*, 87 Misc. 411.

November 21, 1921.

CHARLES D. NEWTON,
Attorney-General.

To JAMES A. FARLEY, *Stony Point, N. Y.*

TOWN LAW — COMPATIBLE OFFICES.

The Town Law does not forbid a person holding the office of clerk of the school board and supervisor simultaneously. The duties are not incompatible.

The question is asked whether a person may hold the office of clerk of the school board and supervisor of the town simultaneously, received.

There is no specific statute which forbids the same person holding these two offices at the same time. Unless forbidden by the statute a person may hold any number of offices so long as the duties of each are not incompatible. I am unable to perceive how the duties of these two offices would in any way conflict, and, I am, therefore, of the opinion that the two offices may be held by one person at the same time.

November 22, 1921.

CHARLES D. NEWTON,
Attorney-General.

To JOHN L. CAMPBELL, *Brocton, N. Y.*

COSTS OF COMMITMENT OF ALLEGED INSANE.

Costs of commitment of alleged insane are a charge upon the town, city or county in which the person resides or may be. The same can be recovered from the estate of the alleged insane.

An inquiry from D. B. Ackerman, county judge and surrogate at Belmont, N. Y., relative to the payment of costs of commitment of insane patients to State hospitals for the insane received.

The estate of the alleged insane person committed or examined for commitment is rendered liable for the general expenses incurred in so doing.

It is to be reasonably inferred from the statute that the municipality should in the first instance pay the fees of the medical examiners (see, also, section 88-a of the Insanity Law—added by chapter 598 of the Laws of 1920), and this for the reason that section 84 of the Insanity Law prescribes in part as follows:

“ * * * The compensation or fees and expenses of health officers for duties performed in respect to the examination, confinement, care and treatment of insane or alleged insane persons, as required by this act, shall in each case be determined and allowed by the judge or justice ordering the commitment or hearing the application, and shall be a charge upon the Town, City or County in which such persons *reside or may be*. * * * ”

This provision, beyond question, includes the payment of all necessary expenses incurred in the commitment, or commitment attempted in good faith, except the question of transportation, including transportation by automobile when necessary.

Section 85 of the Insanity Law provides in part:

“ * * * Costs necessarily incurred in the transfer of patients to the State Hospitals shall be a charge upon the State.* * * ”

In the event that the patient has property sufficient to reimburse the committing county, city or town, the said county, city or town against which said charges are legally levied and by it paid, should recover the disbursements so made from the committee of the person and property of the patient when appointed. The said section 85 of the Insanity Law further provides for payment of expenses so incurred where the person committed is unable to financially reimburse the community causing his commitment.

The expenses of commitment may apparently be charged either “upon the town, city or county in which such persons *reside or may be*.” (Section 85 of the Insanity Law.) Apparently the question of determining whether the town, city or county shall bear the obligation is left to the discretion of the court.

In a letter written the State Hospital Commission under date of December 30th, 1913, by the then Attorney-General, it was said in part:

"* * * In regard to the particular municipality, whether Town or County, charged with the payment of the fees mentioned, I presume that the Judge mentions the municipality against which the fees are chargeable in his order allowing them, but the statute seems to imply that where the proceedings are set in motion by the Overseer of the Town, such Town shall be liable for the payment of such fees, and where the proceedings are set in motion by a Superintendent of the Poor of the County, the County shall be liable for such fees. * * *"

It does not appear that the statute prescribes that all expenses be paid by the health officer and be included in his bill of disbursements. It is my understanding that this is done in many instances in certain localities, and in others, the several persons having claims present them separately. It would seem to reduce the operations involved and more quickly consummate the affairs in each case if the health or committing officer would pay all expenses and have them included in his bill of disbursements.

In order to authorize the county judge to audit a statement for services rendered prior to the examination, it should clearly appear that the services so rendered, for which the charges are made, were necessary as an immediate part of the proceeding for the commitment, that is to say, in the event of the detention of the person while awaiting, or during the period of his or her examination for personal protection and the protection of others, which would perhaps include the cost of services of an attendant to look after the alleged insane person, such expenses could very properly be audited. However, claims of this nature should be regarded with great scrutiny in order to prevent the dissipation of any part of the patient's property.

The charges for transportation are a charge against the State as above outlined. They should always be avoided when possible, except when incurred by use of train, and transportation service of any other nature should be avoided except in emergency cases, as it is the duty of the State to send an attendant to accompany the patient to the hospital.

Near relatives who may be obligated to pay expenses in the matter of commitment and maintenance are defined in section 86

of the Insanity Law as “* * * father, mother, husband, wife and children of an insane person * * *.” And, further, under section 914 of the Code of Criminal Procedure as “* * * the father, mother and children * * *.”

November 22, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO STATE HOSPITAL COMMISSION.

SHERIFFS — SECTION 1, ARTICLE 10, STATE CONSTITUTION.

A person appointed by the Governor to fill a vacancy in the office of sheriff is ineligible for election to the term succeeding the one which he was appointed to fill. At the expiration of the term to fill a vacancy a successor to the office is elected for a full term.

In a communication of November 22 it is stated that Fred S. Couchman, who was sheriff of Monroe county, died last week, and you ask the following questions regarding the filling of the vacancy and the election of a new sheriff next November:

1. “Will the candidate who is elected next fall be elected for a three year term or merely to fill the unexpired term of Sheriff Couchman, deceased?”
2. “If the governor should appoint John Doe to fill the vacancy, under the constitution can John Doe be elected at the general election next fall?”

To your first question I beg to advise that the person elected to the office of sheriff next November will hold for a full term. (See *Coutant v. People*, 11 Wendell, 510.)

Replying to your second question I beg to advise that if John Doe were appointed by the Governor to fill the vacancy under section 1 of article 10 of the Constitution, he would be ineligible to accept the nomination for the full term. Said section of article 10 reads as follows:

“Sheriffs shall hold no other office and be ineligible for the *next term* at the termination of their offices.”

The appointment being a term of office to fill a vacancy, would exclude such appointee from succeeding himself for a full term.

November 25, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO GEORGE W. WEBSTER, *Rochester, N. Y.*

SECTION 1, ARTICLE X OF THE STATE CONSTITUTION — COUNTY LAW,
SECTION 181.

Section 1, Article X of the State Constitution does not apply to a person who is neither elected nor appointed sheriff, but merely executes the duties of the office by virtue of the provisions of section 181 of the County Law.

George E. Clohecy was elected sheriff of Ontario county at the recent election held in November. That Clohecy was appointed under-sheriff on January 1, 1919, by the duly elected sheriff, Reuben H. Gulvin. That Mr. Clohecy has since and continues to hold the office of under-sheriff. You further state that Mr. Gulvin, duly elected sheriff, whose term of office expires on December 31st of this year, resigned his office as sheriff on November 11th. That the Governor does not contemplate filling the vacancy for the remainder of the term. You inquire if it will interfere with Mr. Clohecy qualifying for the office of sheriff on January 1, 1922, if he continues to act as under-sheriff during the interim.

Section 1 of article 10 of the State Constitution provides in part as follows:

* * * "Sheriffs shall hold no other office and be ineligible for the next term after the termination of their office." * * *

Section 181 of the County Law provides as follows:

"Each sheriff shall, within ten days after he enters on the duties of his office, appoint some proper person under-sheriff of his county, to hold during his pleasure. When a vacancy shall occur in the office of sheriff, the under-sheriff shall, in all things, execute the duties of the office as sheriff, until a sheriff shall be elected or appointed and duly qualified; and any default or misfeasance in the office of such under-sheriff in the meantime, as well as before, shall be deemed to be a breach of the undertaking given by the sheriff who appointed him and also a breach of the undertaking executed by such under-sheriff, to the sheriff by whom he was appointed."

The question presented is whether or not the under-sheriff becomes the sheriff within the meaning of section 1 of article 10 of the Constitution, prohibiting a succession of terms in that office.

I think it is clear that he does not. Under the provisions of section 181 of the County Law the under-sheriff does not become

the sheriff, but merely executes the duties of the office as sheriff. The term "as" does not mean the thing itself, but "like or similar to" the sheriff. This section does not make the under-sheriff sheriff, but merely confers on him power and authority to execute the duties of the office in a like manner as the sheriff would execute them.

It seems clear to me that the inhibition contained in the Constitution only operates against a person duly elected or appointed to the office of sheriff and would therefore not apply to a person who is not the holder of the office by the reason of an election or appointment, but who merely executes the duties of the office by virtue of the mandate of the law.

November 26, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO EARLE S. WARNER, *Phelps, N. Y.*

WORLD WAR — TERMINATION OF; EFFECT ON STATE LAWS.

The World War terminated on March 3, 1921, by resolution of Congress.

An opinion as to when the recent war was terminated is requested.

Congress by Public Resolution No. 64-66th Congress (H. J. Res. 382)—See Part 1 Statutes 3rd Session 66th Congress pp. 1359-60, declared that certain acts of Congress, joint resolutions and proclamations shall be construed as if the war had ended and the present or existing emergency expired.

So that you may have the resolution before you for future reference, I set it out in full.

"Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled. That in the interpretation of any provision relating to the duration or date of the termination of the present war or of the present or existing emergency, meaning thereby the war between the Imperial German Government and the Imperial and Royal Austro-Hungarian Government and the Government and people of the United States, in any Acts of Congress, joint resolutions, or proclamations of the President containing provisions contingent upon the duration of the

date of the termination of such war or of such present or existing emergency, the date when this resolution becomes effective shall be construed and treated as the date of the termination of the war or of the present or existing emergency, notwithstanding any provision in any Act of Congress or joint resolution providing any other mode of determining the date of such termination. And any Act of Congress, or any provision of any such Act, that by its terms is in force only during the existence of a state of war, or during such state of war and a limited period of time thereafter, shall be construed and administered as if such war between the Governments and people aforesaid terminated on the date when this resolution becomes effective, any provision of such law to the contrary notwithstanding; excepting, however, from the operation and effect of this resolution the following Acts and proclamations, to wit: Title 2 of the Act entitled "The Food Control and District of Columbia Rents Act," approved October 22, 1919 (Forty-first Statutes, page 297), the Act known as the Trading with the Enemy Act, approved October 6, 1917 (Fortieth Statutes, page 411), and all amendments thereto, and the First, Second, Third, and Fourth Liberty Bond Acts, the Supplement to the Second Liberty Bond Act, and the Victory Liberty Loan Act; titles 1 and 3 of the War Finance Corporation Act (Fortieth Statutes, page 6506) as amended by the Act approved March 3, 1919 (Fortieth Statutes, page 1313), and public Resolution Number 55, Sixty-sixth Congress, entitled "Joint resolution directing the War Finance Corporation to take certain action for the relief of the present depression in the agricultural sections of the country, and for other purposes," passed January 4, 1921; also the proclamations issued under the authority conferred by the Acts herein excepted from the effect and operation of this resolution; Provided, However, That nothing herein contained shall be construed as effective to terminate the military status of any person now in desertion from the military or naval service of the United States, nor to terminate the liability to prosecution and punishment under the selective service law, approved May 18, 1917 (Fortieth Statutes, page 76), of any person who failed to comply with the provisions of said Act, or of Acts amendatory thereof: Provided, Further, That the Act entitled "An

Act to amend section 3, title 1, of the Act entitled 'An Act to punish acts of interference with foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes,' approved June 15, 1917 (Fortieth Statutes, page 217), and for other purposes," approved May 16, 1918 (Fortieth Statutes, page 553) be, and the same is hereby repealed, and that said section 3 of said Act approved June 15, 1917, is hereby revived and restored with the same force and effect as originally enacted.

Nothing herein contained shall be held to exempt from prosecution or to relieve from punishment any offense heretofore committed in violation of any Act hereby repealed or which may be committed while it remains in force as herein provided.

Approved, March 3, 1921."

It was approved March 3, 1921.

This joint resolution, in substance, provides "that in the interpretation of any provision relating to the duration or date of the termination of the present war or the present existing emergency * * * containing provisions contingent upon the duration or date of termination of said war * * * the date when this resolution becomes effective shall be construed and treated as the date of the termination of the war * * * and any act of Congress or any provision of such act that by its terms is in force * * * during such state of war and a limited period of time thereafter shall be construed and administered as if such war * * * terminated on the date when this resolution becomes effective.

There are certain Acts excepted from the above joint resolution but they cannot have any bearing upon any state law to which the question of the termination of the late war might apply.

In view of this action of Congress which has been approved by the President of the United States, I am of the opinion that for all state purposes, and especially for the administration of the Civil Service Law and related statutes and rules, the late war has terminated and the date of such termination is March 3, 1921.

In support of this conclusion I refer you to the case of *Guaranty Trust Company of New York v. Bornhoeft*, and the decision therein by Mr. Justice Hotchkiss of the Supreme Court, 1st Judi-

cial District, reported in *The New York Law Journal* for October 15, 1921, at page 187. It was there held with reference to the "military affidavit" heretofore required to be furnished in all cases of default in any court proceeding and in pursuance of section 200 of the Soldiers' and Sailors' Civil Relief Act, approved March 8, 1918, that the war had ended on March 3, 1921.

A similar holding was made by Mr. Justice Howard of the Third Judicial District within the last month in the case of *George H. Swick v. County Clerk of Rensselaer County*. No opinion was written in this case.

November 28, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO THE STATE CIVIL SERVICE COMMISSION.

ARTICLE VIII, SECTION 10, STATE CONSTITUTION — WATER BONDS.

Limitation of this section refers only to the term of the bonds and not to power of the city to become further indebted. Bonds in excess of the limitation must be retired within twenty years.

You inquire for my opinion as to the construction to be placed upon that part of section 10 of article 8 of the State Constitution, which reads as follows:

"Nor shall this section be construed to prevent the issue of bonds to provide for the supply of water; but the term of the bonds issued to provide for the supply of water, in excess of the limitation of indebtedness fixed herein shall not exceed twenty years, and a sinking fund shall be created on the issuing of the said bonds for their redemption by raising annually a sum which will produce an amount equal to the sum of the principal and interest of said bonds at their maturity."

That part of the section was amended in 1910 to read as at present. Prior to that time it provided so far as material as follows:

"* * * but the term of the bonds issued to provide for the supply of water shall not exceed twenty years, etc.
* * *"

It will be noted, therefore, that prior to the amendment of 1910, the Constitution provided that the term of bonds issued for the supply of water should not exceed twenty years, but under the amendment the term of the bonds in excess of the limitation of indebtedness is not to exceed twenty years.

It seems to me that this is a specific limitation on the term of bonds, and has nothing to do with the power of the city to become further indebted. Under the section prior to the amendment, the water bonds had to be retired within twenty years, in order to make them a legal issue, but under the amendment only the amount of bonds in excess of the limitation must be retired within twenty years. The provision as to the term of the bonds has no relation to the provision, relating to the power of the city to become further indebted.

Applying the above principle to the facts presented by you leads to the conclusion that the term of bonds amounting to approximately \$750,000, being in excess of the ten per cent. limitation, shall not exceed twenty years. The term of the remainder of the bonds could, I take it, extend over a longer period.

The question is one not free from doubt and I have been unable to find any reported cases in which the courts have passed upon that particular clause in the Constitution. The amendment was put in by the concurrent resolution of the legislature and any discussions that may have been had either in the judiciary committee or in the Legislature, which might throw light upon the purpose and intent are not available. However, it is obvious that if all the bonds are retired within twenty years, the difficulty that presents itself would be obviated.

You doubtless appreciate that the opinion of this department is not binding upon you and is rendered merely as a courtesy in our endeavor to assist you. In the last analysis the responsibility of the determination of the question rests with you as the legal adviser of the city.

November 30, 1921.

CHARLES D. NEWTON,
Attorney-General.

To ALBERT E. NUGENT, *Dunkirk, N. Y.*

HIGHWAYS ON STATE RESERVATION AT NIAGARA — SECTIONS 102-103 OF THE PUBLIC LANDS LAW — SECTION 176 OF THE HIGHWAY LAW.

No duty devolves upon the commissioners of the State Reservation at Niagara to keep the sidewalks free from snow and ice. Neither does any liability rest upon the State for accidents resulting by reason of the accumulation of snow and ice.

A communication submitting the following has been received:

“The foundations of the buildings on the east side of the street fronting on Prospect Park of the Reservation, practically coincide with the property line of the State. These buildings are occupied by stores and places of amusement. The sidewalks in front of these buildings are state property, and always have been maintained by the State without charge to the property owners. These property owners have taken the attitude that as the sidewalks belong to the State, it is the duty of the State to keep the sidewalks free from snow and ice, while as a matter of course on all the other streets of the city the property owner or occupant is compelled to do this. Heretofore our Commission, apprehensive of accident, has sent its force to clear the sidewalks whenever a snow or sleet storm came along.”

An opinion as to whether or not it is the duty of the State of New York to keep such sidewalks free from snow and ice is requested.

Section 102 of the Public Lands Law prescribing the powers and duties of your honorable commission states that such commissioners shall

“have the control and management of the state reservation at Niagara.

Layout, manage and maintain such reservation and make and enforce ordinances, by-laws, rules and regulations necessary to effect the purposes thereof,” etc.

The purposes of the reservation are set forth in section 103 of the Public Lands Law as follows:

“The State reservation at Niagara shall forever be reserved by the State for the purpose of restoring the scenery of Niagara Falls, and preserving it in its natural condition and kept open and free of access to all mankind without fee, charge or expense to any person for entering upon or passing through or over any part thereof.”

I have found upon investigating the records on file in the office of the Secretary of State that the highway or street facing Prospect

park is known as Canal street; that in the condemnation proceeding acquiring these lands under the order of confirmation of the report of the commissioners on record in Deed Book No. 43 of the Land Board at page 370, the absolute fee to this highway or street was taken, and from your communication it appears that the boundary line thereof is approximately the foundation line of the buildings fronting on said street; that the State is the owner in fee simple of the street and sidewalk adjoining the buildings in question.

It, therefore, appears under section 102 of the Public Lands Law that your honorable commission is the sole regulatory body in charge of the reservation with power to control, and manage the same and make such ordinances, by-laws, rules and regulations as you may deem necessary to carry into effect the purposes for which the reservation was created.

There is no statutory duty imposed upon the State or any of its officers or servants to keep any streets, highways or byways free and clear from snow and ice. The sidewalk is a part of the street or highway. It is optional with the Commission as to whether or not you shall keep any of the paths, streets, highways, byways or sidewalks within the reservation free and clear from snow and ice.

The State has never assumed any liability for defects occasioned from any cause in the paths or streets of its parks. The only assumption of liability for defects in highways is contained in section 176 of the Highway Law, and applies only to State or county highways maintained by the State by the patrol system. The question of nonliability on the part of the State for such a condition as your communication describes has been settled in the case of *Smith v. State of New York*, 227 N. Y. 405 (which was an accident that occurred on one of the paths of the Niagara reservation), and wherein the court held:

“The State is not liable for injuries arising from the negligence of its officers and agents unless such liability has been assumed by constitutional or legislative enactment. Such exemption does not depend upon its immunity from action without its consent, but rests upon the grounds of public policy that no obligation arises therefrom.”

Also, see, *Locke v. State of New York*, 140 N. Y. 480.

Sipple v. State, 99 N. Y. 284.

Litchfield v. Bond, 186 N. Y. 66-83.

I, therefore, conclude that no duty devolves upon the Commissioners of the State reservation at Niagara to keep the sidewalks free from snow and ice. Neither does any liability rest upon the State of New York for accidents which might result by reason of the accumulation of snow and ice thereon.

November 30, 1921.

CHARLES D. NEWTON,
Attorney-General.

To ALPHONSO T. CLEARWATER, *State Reservation at Niagara.*

COUNTY LAW — STATUTES GOVERNING THE APPOINTMENT OF A SPECIAL DEPUTY COUNTY CLERK DISCUSSED — SUPERVISOR MAY NOT HOLD THE OFFICE OF DEPUTY COUNTY CLERK.

Statutes authorizing the appointment and defining the duties of deputy and special deputy county clerks discussed.

A supervisor may not hold the office of deputy county clerk.

These questions are submitted:

(1) May a county clerk appoint a special deputy county clerk who can do anything a deputy county clerk can do?

(2) Is it permissible for a person to hold the offices of supervisor and deputy county clerk at the same time?

The statutory provisions with respect to the appointment of deputies in the office of the county clerk are found in article IX of the County Law.

Section 162 authorizes the appointment by the clerk of a "deputy clerk" to hold office during the pleasure of the county clerk.

It further provides that:

"When any such deputy is temporarily absent, disqualified or disabled, the clerk shall appoint some one of his assistants to act as a deputy in his place for a period not exceeding thirty days and without additional compensation."

It also provides for the designation by the county clerk of either of the five counties constituting the city of Greater New York of "assistants or clerks appointed by him and employed in the naturalization of aliens to be *special deputy county clerks* authorized to administer oaths required by the Naturalization Law; * * *"

I find no provision for the appointment of "special deputy county clerks" in any other counties.

Section 163 provides that the deputy county clerk "may perform such duties of the clerk as may be assigned to him by an

order of the clerk to be entered in his office and shall perform all the duties of the clerk when the clerk shall be absent from his office, or shall be incapable of performing the duties thereof, or when the office shall become vacant, until it shall be filled; except that of deciding upon the sufficiency of sureties, which duty shall devolve upon the county judge."

Section 163-a provides that:

"The clerk of any county may designate one of his assistants to be the calendar clerk of such county who may in the absence of any deputy clerk or for the purpose of assisting any deputy clerk, and after taking the required oath, perform such duties of the clerk as may be assigned to him by an order of the county clerk to be entered in his office * * *."

As I read these sections you are not authorized to appoint a special deputy county clerk, but you are authorized to appoint a deputy county clerk who can, except as stated in section 163, perform such of the duties of the county clerk as may be assigned to him by your written order to be entered as aforesaid, and you may also designate one of your assistants to be calendar clerk of the county, whereupon he may *either* in the absence of the deputy clerk, "*or* for the purpose of assisting any (the) deputy clerk," perform such of the duties as are incumbent upon you as county clerk "as may be assigned to him" by your written order to be entered as aforesaid.

To state it otherwise, the aforesaid sections virtually authorize the appointment of two deputy clerks but neither thereof should be designated as a "special deputy."

With respect to the second question, in view of the fact that the board of supervisors is authorized to fix the salary of the county clerk and his deputy; fix the amount of the undertaking of the clerk, audit his accounts, etc. (Sections 12, 164 of the County Law), I believe that there is such an incompatibility between the offices of deputy county clerk and supervisor as to prohibit the same person from holding the two offices at the same time.

In writing the foregoing I have assumed, without making an investigation, that no special statutory provision exists covering these matters, relating to Tompkins county.

December 2, 1921.

CHARLES D. NEWTON,
Attorney-General.

To HON. WM. C. BAKER, *County Clerk-Elect, Ithaca, N. Y.*

SECTION 1, ARTICLE X OF THE STATE CONSTITUTION — SHERIFF.

Section 1, article X of the State Constitution forbids a person appointed sheriff as well as a person elected sheriff from succeeding himself.

Inquiry is made whether a person appointed to fill the vacancy in the office of sheriff caused by the death of the sheriff will not be eligible for nomination and election to the office of sheriff for the next term following the termination of the term of the person appointed to fill the vacancy.

Replying thereto beg to advise that this department has held that under section 1 of article 10 of the State Constitution, which provides that sheriffs shall be ineligible for the next term at the termination of their offices, forbids a person who has been appointed to the office of sheriff to succeed himself for a full term.

In other words the Constitution forbids not only a person elected sheriff from succeeding himself, but also forbids a person appointed sheriff from succeeding himself.

December 7, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO HARRY C. PERKINS, *Binghamton, N. Y.*

CIVIL SERVICE LAW — SECTION 21-A AS AMENDED BY CHAPTER 768, LAWS 1917
— RETIREMENT OF CIVIL WAR VETERANS.

To be entitled to retirement under section 21-a of the Civil Service Law, as amended, a Civil War veteran must have been employed for a continuous period of at least ten years in the civil service of the State of New York or some city or county thereof.

Request is made for an interpretation of chapter 768 of the Laws of 1917, with reference to your right to be retired on a pension under said Act.

Chapter 768 of the Laws of 1917, which amended section 21-a of the Civil Service Law is as follows:

Section 21-a. Retiring Veterans of The Late Civil War and Granting Them Pensions. Every soldier, sailor or marine of the army or navy of the United States in the late civil war honorably discharged from service *who shall have been employed for a continuous period of ten years or more* in the civil service of the State of New York and the several cities and counties thereof and who shall have reached the age of seventy years upon his own request, or if employed in manual labor upon being incapacitated for performing man-

ual labor, shall be retired from his employment by the State of New York and the several cities and counties thereof, and thereafter and during his life the State department or institution and the several cities and counties which employed him at the time of his retirement shall pay to him in the same manner that the salary or wages of his former position were customarily paid to him *an annual sum equal in amount to one-half the salary or wages paid to him in the last year of his employment; provided, however, that the amount so to be paid to such retired veteran shall not exceed the sum of one thousand dollars per annum.*

Section 2. This act shall take effect immediately.

Chapter 54 of the Laws of 1921 further amended said section among other ways by omitting the words "provided, however, that the amount so to be paid to such retired veteran shall not exceed the sum of one thousand dollars per annum." This resulted in the elimination of the maximum amount which might be paid to any veteran retired under this section as amended.

The particular feature of this article of the Civil Service Law, about which you are concerned is the requirement of *employment for a continuous period of ten years or more in the civil service* of the State of New York, and of the several cities and counties thereof.

I am of the opinion that in order to entitle you to be retired under section 21-a of the Civil Service Law, as amended, you must have been employed for a *continuous period of at least ten years* in the civil service of the State of New York or some city or county thereof.

This continuous service of at least ten years is an absolutely necessary condition precedent to your right to retirement, and until you complete such ten years of continuous service, you could not legally be retired.

In your letter you state that you entered upon your present position on September 1, 1912. Were you immediately preceding this appointment in the civil service of the State or of any city or county? If you were in such service and there was no interruption between that service and your service in your present position, a different conclusion might be reached.

December 8, 1921.

CHARLES D. NEWTON,
Attorney-General.

To JOHN H. FOREY, Syracuse, N. Y.

PUBLIC RECORDS — PUBLICATION OF CONTENTS OF PROBATED WILL.

The publication in the public press of an accurate statement of the contents of a will which has been duly probated cannot be enjoined.

Inquiry is made as to whether a last will and testament, duly probated, is a public record to the extent that newspaper reporters can insist on publishing in the public press the details thereof and the disposition which a testator makes of his property among his family or otherwise.

At common law it was the rule that public records could not be examined by everyone, but could be inspected only by persons having an interest in the matter and the right to inspect, in the absence of interest, could be denied. (*Matter of Egan*, 205 N. Y. 147, page 153; 23 R. C. L. 160, § 10; 34 Cyc. 592; 24 Am. & Eng. Enc., 2nd Ed. 182.) In this State statutory enactments have to a great extent rendered inoperative the application of the common-law rule. For example, section 51 of the General Municipal Law provides in part that:

“All books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state are hereby declared to be public records, and shall be open, subject to reasonable regulations to be prescribed by the officer having the custody thereof, to the inspection of any taxpayer.”

Whether this particular statute applies to the records in the office of a surrogate need not, however, be determined at this time.

Section 66 of the Public Officers Law, which is of general application, provides that:

“A person, having the custody of the records or other papers in a public office, within the state, must, upon request, and upon payment of, or offer to pay, the fees allowed by law, or, if no fees are expressly allowed by law, fees at the rate allowed to a county clerk for a similar service, diligently search the files, papers, records, and dockets in his office; and either make one or more transcripts therefrom, and certify to the correctness thereof, and to the search, or certify that a document or paper, of which the custody legally belongs to him, can not be found.”

This section undoubtedly applies to wills probated by a surrogate's court. Moreover, section 42 of the Decedent Estate Law requires an executor of a will, relating to real estate, to record in each county where the testator had real estate, an exemplified copy of the will. When thus recorded it becomes part of the county records and as such open to public inspection under such reasonable regulations as may be prescribed.

While the newspaper publication of the contents of a will, because of the failure to note circumstances not disclosed in the will itself, may unfairly reflect upon the testator, I know of no way in which an accurate statement of the contents of a will can be suppressed from publication.

December 9, 1921.

CHARLES D. NEWTON,
Attorney-General.

To T. CUTHELL CALDERWOOD, *Johnstown, N. Y.*

BIDS CANNOT EXCEED AMOUNT APPROPRIATED.

Where bids for public improvement exceed the amount appropriated, the bids should be rejected under the provisions of section 35 of the State Finance Law, even though certain work could be eliminated without impairing the efficiency and stability of the work so that contractors could change their bids so as to come within the appropriation. Such act would amount to a new proposal and should be readvertised.

On December 6th bids were received from the Board of Managers of Letchworth Village for the completion of service building and eight cottages of the girls group. The sum total of the low bids received was \$177,505. The amount available for this work is the sum of \$175,089.54, from which amount there must be deducted \$100 to cover the cost of advertising.

Bids for the same work were received on June 6, 1921, and totaled the sum of \$194,573, which was so much in excess of the appropriation that the bids were rejected. The inquiry states:

"It is now proposed, if such a procedure is a proper and legal way of doing it, to ask the low bidders for each branch of the work to submit deductions covering certain portions of the work which can be omitted without impairing the efficiency and stability of the work so as to bring the bids of the contractors within the amount available."

You request an opinion as to whether such a proceeding would be a proper and legal one which the board of managers could take advantage of and the State Architect properly approve.

At the time the proposal for bids was published I assume that the proposal stated the amount of the moneys available for this work and estimates for each branch of the work were made by your department. If this is so, then the contractors were aware of the appropriation for the work in its entirety and the amount of the estimates for each branch of the work. If the bids of the contractors of the various branches of this work exceeded the amount appropriated, then under the provisions of section 35 of the State Finance Law the bids should be rejected, as a deduction covering certain portions of the work which can be omitted without impairing the efficiency and stability of the work would practically amount to a new proposal and result in a change of the bids of the various contractors so as to bring the construction of the work in its entirety within the amount of moneys available for this construction. Such a proceeding would establish a dangerous precedent, and, while this matter is a small one, comparatively speaking, the rule established by such a proceeding in this case might work to the great disadvantage of the State in future matters involving similar questions.

If, in your opinion, it is possible to make deductions covering certain portions of the work which can be omitted without impairing the efficiency and stability of the work, so as to bring the construction of this work within the amount available, then the specifications should be changed so as to meet that condition, and a new proposal advertised for bids for this construction under your changed plans and specifications, so that each person, company or corporation desiring to bid on this construction may be apprised of just what is required.

December 9, 1921.

CHARLES D. NEWTON,
Attorney-General.

To LEWIS F. PILCHER, *State Architect.*

ALIENS — PROPERTY RIGHTS.

Aliens residents of the State of New York are empowered to purchase and hold title to property in this State. Rights of alien enemies.

The opinion of this Department as to the right of an Austrian citizen, not a resident of the State of New York, to purchase and hold title to property in this state is asked.

There is no statute in the State of New York denying to aliens the right to acquire, hold and dispose of personal property in

this State. Under the treaty between the United States and the Austria-Hungary government proclaimed February 10, 1831, the right of citizens or subjects of the respective governments to hold and dispose of personal property is guaranteed. The Court of Appeals in the case of *Techt v. Hughes*, reported in 229 N. Y. at page 222, decided on June 8, 1920, held that the provisions of such a treaty compatible with a state of hostilities were not abrogated by declaration of war.

As respects real property the situation is somewhat different. Section 10 of the Real Property Law of the State of New York specifically provides as to who may hold real property in this State. Subdivision 2 of section 10 provides as follows

"Alien friends are empowered to take, hold, transmit and dispose of real property within this state in the same manner as native born citizens and their heirs and devisees take in the same manner as citizens; * * *

It is clear that "alien enemies", therefore, have only such rights as were theirs at common law. An "alien enemy" is defined as a subject of a foreign state at war with the United States.

During the period of time between the declaration of war between this country and the Austrian government and the cessation thereof by the treaty of peace, it would seem that citizens or subjects of the Austrian government were not entitled to acquire, hold and dispose of real property under the laws of the State of New York. This disability however, was not absolute but was limited by the provisions of article 2 of the convention between the United States and Austria concluded May 2, 1848, which provides as follows:

"Where, on the death of any person holding real property, or property not personal, within the territories of one party, such real property would, by the laws of the land, descend on a citizen or subject of the other were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of two years to sell the same; which term may be reasonably prolonged according to circumstances; and to withdraw the proceeds thereof, without molestation, and exempt from any other charges than those which may be imposed in like cases upon the inhabitants of the country from which such proceeds may be withdrawn."

The Court of Appeals in the case of *Techt v. Hughes* (*supra*), held that this provision of the treaty between the United States and the Austrian government was not abrogated by the coming of the war and that, as a treaty, is the supreme law of the land, which superseded all local laws inconsistent with its terms, therefore, subd. 2 of section 10 of the Real Property Law was modified by the terms of the treaty to the extent of permitting alien enemies to take by descent, and under the condition that the property was to be disposed of within the "term of two years; which term may be reasonably prolonged according to the circumstances."

Peace having been concluded between the United States and the Austrian government, a citizen or subject of the Austrian government is entitled to take, hold and dispose of real property within this state, although not a resident of the State of New York.

December 16, 1921.

CHARLES D. NEWTON,
Attorney-General.

To MAX KOENIG, *New York City.*

VILLAGE LAW, SECTION 222 — WATER SYSTEM — POOR LAW, SECTION 23 —
QUARANTINE — INDIGENTS.

The provisions of section 222 of the Village Law, defining the amount of moneys which may be expended by the villages of the class mentioned in said section in the extension of mains or distributing pipes of the water system within the village are mandatory, and a village cannot be compelled, nor would it be allowed to furnish water on demand of persons in any part of the village with an absolute disregard of the expense entailed thereby.

Poor Law, Section 23.— Where, as a result of quarantine regulations, a family residing within a town is reduced to the status of indigent persons, temporary relief may be afforded to such a family under section 23 of the Poor Law, and the charge therefor is a proper charge as expense for the support of the poor.

Certain inquiries to this office affecting village water supply and indigent persons in a town are made.

With respect to your first inquiry, wherein you ask whether the village can be compelled, or would it be allowed, to furnish municipal water on demand to premises in any part of the village, regardless of expense to the village, I beg to advise you that the subject matter of your inquiry is covered by the provisions of article 9 of the Village Law. Section 224 of the Village Law reads as follows:

"§ 224. Supervision and extension of system. A system of water works acquired or established under this article shall be under the control and supervision of the Board of Water Commissioners. The board shall keep it in repair and may, from time to time, extend the mains or distributing pipes within the village, if the expense thereof in any year in a village of the fourth class shall not exceed five hundred dollars, in a village of the third class one thousand dollars, in a village of the second class fifteen hundred dollars, and in a village of the first class two thousand dollars. If the estimated expense will exceed the above amounts, such extension can only be made when authorized by a proposition adopted at an election. A board may, in lieu of extending the mains or distributing pipes, use the amount above specified, or a part thereof, in improving, bettering or perfecting the existing system, such as mains, reservoir, pumping station, filter and land; but where a village of the second class supplies two or more other villages with water, through a system of distributing pipes, in such villages, owned and controlled by it, the board of water commissioners of such village may expend for extensions of distributing pipes of its system in any year the sum of fifteen hundred dollars in addition to the foregoing amount."

Villages are classified in section 40 of the Village Law as follows:

"§ 40. Classification of villages. Villages are divided into classes according to their population, as shown by the last enumeration, village, state or federal, as follows:

First class. Villages containing a population of five thousand or more.

Second class. Villages containing a population of three thousand and less than five thousand.

Third class. Villages containing a population of one thousand and less than three thousand.

Fourth class. Villages containing a population of less than one thousand."

In the case of *People ex rel. Hilliker v. Pierce*, reported in 64 Misc. at page 627, it was held that where a village avails itself of its privilege of establishing a water works system under the provisions of the Village Law, it must, as long as any property owner asks, extend the mains and supply properties that are un-

supplied, provided that the cost of such extension in one year does not exceed the amount set forth in section 224 of the village Law.

It would, therefore, appear that the village cannot be compelled, nor would it be allowed to furnish water on demand to persons in any part of the village with an absolute disregard of the expense entailed thereby. As a matter of fact it cannot extend its mains to supply premises with water in any case where the expense thereof in any one year will exceed the amount set forth in section 224 of the Village Law, without the consent therefor being given by the taxpayers of the village through the medium of a proposition authorizing such an extension, adopted at an election.

With respect to your question as to whether the supplies furnished by the overseer of the poor of the town of Lima to a needy family of the village of Lima, under quarantine by the board of health of the village of Lima, would be a charge against the village of Lima or against the county of Livingston, I beg to advise you that it has been ruled before that where a person or family of a person, by illness and a consequent quarantine for such illness, comes within the definition of persons to whom temporary relief may be afforded under section 23 of the Poor Law, that such relief is to be afforded them in the same manner as relief afforded other poor people of the town who are in need of temporary relief, and the liability therefor is to be assumed in the same manner as other charges for the relief of the poor are taken care of in the village.

In the case of People ex rel. Town of Blenheim v. Board of Supervisors, reported in 121 N. Y. at page 345, the court recognized two classes of poor persons. One class, being persons entirely destitute and without property, and without the capacity to earn a livelihood for themselves and their families, were defined as paupers. The other class are persons having no property but who have the capacity to and do in fact provide for themselves and families, but in providing for their families and themselves are dependent solely upon their daily labor, and when this latter class, through any cause, are unable to labor and provide for themselves and families, the necessity for relief from the poor authorities follows. This latter class are generally termed indigent persons, to whom the relief necessary through the poor authorities is only for a temporary period of time. Section 23 of the Poor Law provides for the relief of such indigent persons, said section reading as follows:

“§ 23. Temporary relief of persons who cannot be removed to almshouse. If it shall appear that the person so applying requires only temporary relief or is sick, lame or otherwise disabled so that he cannot be conveniently removed to the county almshouse, or that he is a person who should be relieved and cared for at home under Article 6 of this chapter, the overseer shall apply to the supervisor of the town, who shall examine into the facts and circumstances, and shall, in writing, order such sum to be expended for the temporary relief of such person, as the circumstances of the case shall require, which order shall entitle the overseer to receive any sum he may have paid out or contracted to pay, within the amount therein specified, from the county treasury to be by him charged to the county, if such person be a county charge, if not to be charged to the town where such relief was afforded; but no greater sum than ten dollars shall be expended or paid for the relief of any one poor person, or one family, without the sanction, in writing, of one of the superintendents of the poor of the county, which shall be presented to the county treasurer, with the order of the supervisor, except when the Board of Supervisors or Town Board has made rules and regulations as prescribed in § 13 of this chapter.”

Article 6 referred to in the section last quoted has to do with the relief of soldiers, sailors and marines. Section 13 referred to in the section last above quoted reads as follows:

“§ 13. Supervisors and members of town boards may direct as to temporary or outdoor relief to the poor. The board of supervisors of any county may make such rules and regulations as it may deem proper in regard to the manner of furnishing temporary or outdoor relief to the poor in the several towns in said county, and provided the board of supervisors shall have failed to make any such rules and regulations, the town board of any town may make such rules and regulations as it may deem proper in regard to furnishing temporary or outdoor relief to the poor in their respective towns, by the overseer or overseers of the poor thereof, and also in regard to the amount such overseer or overseers of the poor may expend for the relief of each person or family, and after the Board of Supervisors of any county, or the Town Board of any town, shall make such rules and regulations,

it shall not be necessary for the overseers of the poor of the towns in said county where such rules and regulations were made by the Board of Supervisors, or if in a town by the said town board, to procure an order from the supervisor of the town, or the sanction of the superintendent of the poor to expend the money for the relief of any person or family, unless the Board of Supervisors of such county or Town Board of such town shall direct; but this section shall not apply to the counties of New York and Kings."

The necessary relief afforded to the person by the poor authorities of the town or county, as the case may be, by reason of the fact that said person is under quarantine, does not make the cost of such relief an expense of the quarantine. The illness and consequent quarantine of the person subject to quarantine regulations may be the factor that reduced the person quarantined to the status of an indigent person, but the relief to which he is entitled or which he is authorized to receive as an indigent person is provided for under the Poor Law and the charge for such relief is to be deemed temporary relief to a poor person, and the cost of the relief to be assumed by the village, town or county, as the case may be, according as to how relief for the poor is generally provided for in the particular locality in which the particular relief may have been afforded.

December 12, 1921.

CHARLES D. NEWTON,
Attorney-General.

To H. H. THOMPSON, *Lima, N. Y.*

PUBLIC HEALTH LAW, SECTION 25 — REPORTING COMMUNICABLE DISEASES.

The reporting of communicable diseases by a local health officer to the State Department of Health, in conformity with section 25 of the Public Health Law, is not a duty necessarily arising out of the contract of employment of a health officer, but is a specific duty enjoined by statute, and such a local health officer is entitled to receive the fee prescribed by section 25 of the Public Health Law, and the payment of such fee is a proper town charge.

Inquiry is made as to whether the fees allowed a health officer for reporting a communicable disease to the State Department of Health, by the provisions of section 25 of the Public Health Law, were a proper town charge, where the health officer claiming such fees was receiving a salary as such health officer pursuant to section 21 of the Public Health Law.

The reporting of communicable diseases by a local health officer to the State Department of Health, in conformity with section 25 of the Public Health Law is not a duty necessarily arising out of the contract of employment of a health officer, but is a specific duty enjoined by statute and a failure to perform this specific duty on the part of a local health officer would render such health officer liable to criminal prosecution. The right to the fee mentioned in section 25 of the Public Health Law accrues in consequence of the performance of a duty imposed by law.

In an opinion of the Attorney-General, printed in the report of the Attorney-General for 1912 at page 452, written in response to certain inquiries of the mayor of the city of Hudson, N. Y., presenting the same question in substance as that involved in your inquiry, it was held that the claim for fees for reporting communicable diseases on the part of a health officer was a legitimate one, for the reason that the service rendered thereby was not voluntary, involving the volition of the health officer in fulfilling a contract obligation, but was a service enforced by law and the neglect to perform such service entailing a penalty.

It follows in accordance with a prior ruling of this office that the fees allowed to a local health officer by the provisions of section 25 of the Public Health Law for the reporting to the State Department of Health of the diseases in said section mentioned, are a legitimate town charge.

December 15, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO CHARLES L. NORTON, *Allegany, N. Y.*

CONSTITUTION, ARTICLE X, SECTION 2 — LOCAL HEALTH OFFICERS — ELECTION OR APPOINTMENT — DE-FACTO HEALTH OFFICER.

A local health officer is one of the officers of the city, town or village wherein he may be employed and the method of his election or appointment is controlled by section 2 of article 10 of the Constitution.

The State Department of Health has no authority to appoint a local health officer.

There is no authority conferred upon any local board of health to appoint a *de facto* health officer or a temporary health officer; the only officer recognized by the statute is the health officer and the authority of a town board of health is limited to the appointment of such an official.

Inquiry is made as to the authority of the State Commissioner of Health or a local board of health to appoint an "acting health officer," or "temporary health officer, or a "*de facto* health officer," was duly received.

Provision for the appointment of a local health officer is found in section 20 of the Public Health Law, wherein it is provided:

"§ 20. Local Boards of Health. * * *. In towns the board of health shall consist of the town board. The local board of health shall appoint a competent physician not a member of the local board of health, to be the health officer of the municipality. The term of office of the health officer shall be four years and he shall hold office until the appointment of his successor. He may be removed for just cause by the local board of health or the State Commission of Health after a hearing; such removal by the local board of health must be approved by the state commissioner of health. The health officer need not reside within the village or town for which he shall be chosen."

The local authority over the local health officer is defined in section 21 of the Public Health Law which reads as follows:

"§ 21. General powers and duties of local boards of health. * * *. Every such local board, subject to the provisions of the Public Health Law and of the Sanitary Code, shall prescribe the duties and powers of the local health officer, who shall be its chief executive officer, and direct him in the performance of his duties, and fix his compensation, which in case of the health officers of cities, towns and villages, having a population of eight thousand or less, shall not be less than the equivalent of ten cents per annum per inhabitant of the city, town or village according to the latest federal or state enumeration; * * *."

Section 21-b of the Public Health Law prescribes the duties of the health officers of towns and villages, the duties in said section detailed being in addition to such other duties as may be lawfully imposed upon such health officers and their duties as so imposed upon them by said section 21-b are subject to the provisions of the public health law and the Sanitary Code.

From the foregoing sections of the Public Health Law there can be no question that the office of health officer is distinctly a local office and as such comes within the provisions of section 2 of article 10 of the Constitution. Section 2 of article 10 of the Constitution reads as follows:

"§ 2. Election or appointment of officers not provided for by the constitution. All county officers whose election or appointment is not provided for by this constitution, shall be

elected by the electors or the respective counties or appointed by the board of supervisors, or other county authorities, as the legislature shall direct. *All city, town and village officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the Legislature shall designate for that purpose.* All other officers whose election or appointment is not provided for by this Constitution, and all officers, whose offices may hereafter be created by law, shall be elected by the people, or appointed as the Legislature may direct."

This section of the Constitution quoted above has been interpreted by the courts on numerous occasions and always to the end that the authority of the municipality to select its own officers shall remain inviolate. In the case of *People ex rel. Metropolitan Street Railway Company v. Tax Commissioners*, reported in 174 N. Y. at page 417, the court, in interpreting section 2 of article 10 of the Constitution, says:

"These and other commands of the different constitutions, when read in the light of prior and contemporaneous history, show that the object of the people in enacting them was to prevent centralization of power in the state and to continue, preserve and expand local self-government." This was effected through a judicious distribution of the power of selecting public officers, by assigning the choice of local officers to the people of the local divisions, and to the people generally, those belonging to the state at large. The management of the local political business of localities, whether as large as a county or as small as a village, is intrusted to local officers selected by the communities where those officers act and through which their jurisdiction extends. The principle of home rule is preserved by continuing the right of these divisions to select their local officers, with the general functions which have always belonged to the office. Unless the office, by whatever name it is known, is protected, as the courts have uniformly held, the right to choose the officer would be lost, for with his former functions gone he would not be the officer contemplated by the Constitution, even if the name were retained. Unless the office or officer is mentioned *eo nomine* in the Constitution, the name may be changed or the office

abolished, provided the functions, if retained at all, remain in some officer chosen by the locality. *Local functions, however, cannot be transferred to a state officer.* The legislature has the power to regulate, increase or diminish the duties of the local officer, but it has been steadfastly held that this power is subject to the limitation that no essential or exclusive function belonging to the office can be transferred to an officer appointed by central authority. The office may go, but the function must be exercised locally if exercised at all. While no arbitrary line is drawn to separate the powers of local and state officers, the integrity of the local office is protected, with its original and inherent functions unimpaired. It is interference, whether direct or indirect, with the vital, intrinsic and inseparable functions of the office as thus defined and understood that the Constitution prohibits."

In the case of *People ex rel. Town of Pelham v. The Village of Pelham*, reported in 215 N. Y., at page 374, speaking of this same section of the Constitution, the court quoted with approval the language contained in the opinion in the case of *Rathbone v. Worth*, 150 N. Y. 459, in which last mentioned case it was said:

"It ought not to require much of argument to show the importance of this clause in our Constitution, or what its presence means for our political institutions. Its very presence in the Constitution of the state since 1846 evidences the importance which the people attach to the preservation of this right in the management of their local affairs. It means the right to choose their local officers, in all its reality; or it means nothing. If it does not mean that the people have reserved the right of administering existing local offices by officers of their own choosing, whether it be done, directly, through an election, or, indirectly, through the method of an appointment by some of their local authorities, I am at a loss to understand its significance, or in what consists its peculiar value * * *. The true interpretation, scope and meaning of this section of the Constitution has been frequently passed upon by this court, and it has been uniformly held that its obvious purpose was to secure to the people of the cities, towns and villages of the state the right to have the local offices administered by officers selected by themselves. It was designed to direct and give force and effect to the prin-

ciple of local self-government which has always been regarded as fundamental in our political institutions, and to be the very essence of every republican form of government. The local government, even in the smallest division of the state, is the preparatory school in which the citizen acquires the rudiments of self-government, hence these institutions have been justly regarded as the nurseries of civil liberty."

In this case last cited, the question arose as to the authority of the Legislature to take away from the village assessors the right to assess property within the corporate limits of the village, and invest the town assessors with the right to make the assessment of real property within the village limits. This right was challenged on the ground that it violated said section 2 of article 10 of the Constitution in that it deprived local officers of functions which essentially belonged to the local offices. In disposing of the question so raised, the court, at page 388 says:

"The constitutionality of the act is sought to be sustained upon the ground that the act in question contemplates simply a different mode or manner in which taxes are assessed and collected, and creates a new district of assessment and of collection. A study of its provisions, however, makes it clear that the act goes far beyond this limit. It not only prescribes a new mode and manner of assessment but strips the local village officials of every vestige of authority which they formerly possessed in this respect, except the right to fix and determine the amount of the annual tax. The important functions of assessment and collection are entirely taken away from the village authorities. Nor does it create a new district. It simply transfers the powers of one political subdivision of the state in regard of local taxation to the officials of a separate and distinct political subdivision. The fact that the village is included within the town does not make the act a lawful exercise of legislative power. If the legislature may thus deprive villages of the right of local self-government, cities and towns may also be deprived of similar rights. If this practice can be lawfully pursued in reference to the smallest political subdivision, recognized by the Constitution, it may be adopted in reference to the other political subdivisions specified in the Constitution. If this may lawfully be done the home rule principle of the Constitution is rendered nugatory and the principle of local self-government

or home rule is entirely subject to legislative discretion. After considering the act from every viewpoint and endeavoring to ascertain whether it could not be viewed from some aspect in which it could be reconciled to the Constitution, we have been forced to conclude that a reconciliation of its provisions with those of the Constitution is impossible. This antagonism between the Constitution and those provisions of the act which invade the local rights of self-government of incorporated villages condemn those of its provisions as unconstitutional and void."

The cases of *People ex rel. Devery v. Kohler*, 173 N. Y. 108, and *People v. Ahern*, 196 N. Y. 221, both sustain the principle of law outlined in the cases whereof portions of the opinion are above set forth. It would thus appear that the section of the Constitution mentioned above not only prohibits the appointment of the local officer by any central authority, but also prohibits the transfer of any essential or exclusive function belonging to a local office or officer to an officer appointed by central authority. The doctrine set forth in the cases cited above was directly applied to the office of local health officer in the case of *People ex rel. Busch v. Houghton*, 182 N. Y., page 301, and the case of the *Matter of Towne v. Porter*, 128 A. D., page 717, wherein it was held that a local health officer could not be appointed by any authority outside of some local body or local authority of the particular municipality in which the health officer was to serve. It would necessarily follow that the State Department of Health cannot appoint a person to the office of health officer for any municipality, whether it might term such officer acting health officer, temporary health officer, or *de facto* health officer.

The public health law imposes upon a local health officer duties the performance of which are not necessarily the function of the office of health officer. By section 21 of the Public Health Law, the right of the local board of health to prescribe the duties of the local health officer is subject to the provisions of the Public Health Law and the Sanitary Code. By section 4 of the Public Health Law the State Commissioner of Health is directed to exercise general supervision over the work of all local health authorities except in the city of New York, and is charged with the enforcement of the Public Health Law and the Sanitary Code. The local health officer also is subject to the Sanitary Code and provisions of the Public Health Law, and it is part of the duties of the local health

officer to carry out the provisions of the Public Health Law and the Sanitary Code and other lawful directions of the board of health.

The Legislature may delegate to certain officials the authority to accomplish matters which are a proper subject of state regulation. The regulation of public health in a local community is not an exclusive function of such a local community. It is a state matter and it is entirely within the power of the Legislature to provide for the enforcement of the public health law and the provisions of the sanitary code in a local community for a temporary period of time by the transfer of the duty of enforcement of the public health law and the provisions of the sanitary code to another person. *People ex rel Commissioners v. Supervisors of Oneida*, 170 N. Y., page 105.

Section 11 of the Public Health Law reads as follows:

“§ 11. Power of Commissioner where Board of Health fails to appoint health officer. If any local board of health shall fail to appoint a health officer, the commissioner of health may, in such municipality exercise the powers of the health officer thereof. The expenses lawfully incurred by him in such municipality shall be a charge upon and paid by such municipality until such time as the local health officer shall be appointed therein, whereupon the jurisdiction of the commissioner of health conferred by this section shall cease.”

This section does not in any sense constitute the state commissioner of health a local health officer in the event a local board of health fails to make an appointment of a local health officer. It simply charges the commissioner of health with the duty of enforcing the Public Health Law and the Sanitary Code, which is a proper concern of the Legislature in a particular locality. Under this section the commissioner of health could not assume to perform any function peculiarly local in its character, but he could, during the period in which a vacancy might exist in the office of health officer in a municipality, take steps to secure the enforcement of the general provisions of the Public Health Law and the Sanitary Code, and could further take cognizance of the interest of health and life of such of the people of the State as might be residents of the particular locality wherein the office of health officer is vacant and all the matters pertaining thereto under his general authority as covered by section 4 of the Public Health Law.

The office of local health officer is a statutory office. There is no implied authority in the electors of any particular municipality or in any officers of a particular municipality to appoint a local health officer. The statute which creates the office of local health officer does so without any qualification. There is no provision of the statute made for a temporary health officer or a *de facto* health officer. The local boards of health in making an appointment of a local health officer cannot prescribe any limitations with respect to how the title of the office shall be characterized. The person nominated by them for health officer must be considered as being the same person described as local health officer under the provisions of the Public Health Law and no regulation of the local board of health or the public health council can change the title of this particular local official to any other than the title of the office defined in the statute.

The public health council, pursuant to the provisions of section 2-c of the Public Health Law, has the power to prescribe by regulation the qualifications of local health officers. The title to the office of a local health officer who did not possess the qualifications prescribed by the public health council, might be challenged. It is perfectly proper for the public health council to waive for a limited period of time the qualifications demanded in the case of any particular health officer. This waiver, however, would not operate to change the title of the health officer, as such title is defined by an express statute. Nor would any practice of the State Health Department or public health council of recognizing a local health officer, who was not possessed of the qualifications required by the Public Health Law, as a *de facto* or acting health officer, alter the provisions of the Public Health Law constituting the person appointed to perform the duties of a local health officer the actual health officer mentioned in the statute.

Whatever difficulty might arise through the selection by a local board of health, for health officer, of a person who did not possess the qualifications required by the public health council, such difficulty would not serve as a legitimate reason to ignore the provisions of the statute relative to the title of health officer.

With respect to the delay occasioned in securing from the public health council a waiver of qualifications in relation to any health officer selected by a town board of health, it might be possible to obviate the delay so occasioned by the public health council delegating to the commissioner of health, or the deputy commis-

sioner, the authority in particular cases to waive the qualifications. This is merely offered as a suggestion to meet the condition occasioned by the delay in having an application for a waiver of qualifications passed upon by the public health council, as there is no authority under the law for any official to perform the duties prescribed by statute to be performed on the part of the local health officer under the title of any office but that of health officer.

December 20, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO MATTHIAS NICOLL, JR., M. D., *State Health Department.*

DEPOSITS HELD BY INSURANCE DEPARTMENT—ALIEN PROPERTY CUSTODIAN.

The Superintendent of Insurance should turn over to the alien property custodian upon demand all securities held by him belonging to companies being liquidated under the trading with the Enemy Act.

I am informed that the alien property custodian is about to make application in the Federal courts for an order directing you to turn over to him securities heretofore deposited with you by German insurance companies for the benefit of policyholders in the United States. These companies are now being liquidated by the alien property custodian.

Previous demands of the alien property custodian for deposits in similar cases have been complied with, upon order of the court, where examination has disclosed that all obligations and liabilities of the companies concerned had been terminated. We expressed the view then (December 1, 1919) and we are still of the same opinion that the Trading with the Enemy Act was sufficient to compel a surrender of the securities so held even though the claim against the companies had not been liquidated, and a decision of the United States Supreme Court more recently in *Central Union Trust Company v. Garvin*, as Alien Property Custodian, 254 U. S. 554, tends to the same conclusion. Since this decision, the Trading with the Enemy Act being still in force, we cannot see any ground upon which resistance to the demand of the custodian can be justified, and this office ought not to oppose the granting of orders directing you to turn over the deposits.

December 24, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO FRANCIS R. STODDARD, JR., *Albany, N. Y.*

RIGHT TO CUT ICE POSSESSED BY THE OWNER OF THE BED OF A
NATURAL WATERWAY.

The owner of the title to the bed of a natural waterway possesses the exclusive right to take ice therefrom.

An opinion is requested as to whether the general public possesses a right to cut ice "on a mill pond" in the city of Geneva.

The general rule of law is that the person who holds title to the bed of a stream or body of water possesses the exclusive right to take ice therefrom. If, as I assume, the ice to which you refer is formed on the waters of some creek or small stream, presumably the title to the bed thereof many years ago passed out of the State of New York and is now privately owned. As stated, the owner of the bed of the pond possesses the right to take ice therefrom and may rightfully exclude the public from so doing or grant the right to certain persons. I know of no waterways in the vicinity of Geneva, the title to the bed of which is in the State, except perhaps Seneca lake.

December 29, 1921.

CHARLES D. NEWTON,
Attorney-General.

To GEORGE D. NETTLETON, *Geneva, N. Y.*

MEMORANDA

[419]

MEMORANDA

MEMORANDUM AFFECTING HALL OF MILITARY RECORDS.

By chapter 744 of the Laws of 1865, a commission was created to provide a suitable repository for the records of the War of the Rebellion and for the collections of the Bureau of Military Record. Section 3 of the act provided:

"A fire-proof structure, to be called the Hall of Military Record, is hereby authorized to be erected, provided the sum of seventy-five thousand dollars shall be voluntarily contributed by the people of this state for that purpose."

Section 4 of the act directed the commission to bring the objects of the act to the attention of the public and to "apportion to the several towns, villages and cities of the State, such sums as they may deem proper, and after selecting a representative in each locality, shall direct that such assignment be notified to such representative, to be by him brought to the attention of his town." Section 5 provided:

"All moneys contributed for this object shall be paid over to the treasurer of the state, and be by him deposited in the manner as other public funds, a separate account, denominated the military record fund, being kept of all such moneys."

Section 8 provides that when the sum of thirty-five thousand dollars shall have been received, the commissioners may advertise for a plan for a building arranged for the records of the military services of individuals, services of regiments, and the records of the part taken by towns, cities and counties in the war; "Also for the proper display of flags, trophies and other objects of military interest now belonging to the collection of the State, and hereafter to be received, and also for the preservation and convenient use of newspapers, books, documents, pamphlets and other papers belonging to the bureau of military record, etc."

Section 9 provides that such towns as shall contribute the share assigned them by the commissioners for the construction of this building, may deposit their record books, etc., for safekeeping.

Section 10 appropriated seventy-five thousand dollars out of the military record fund to pay for the construction of the building.

Chapter 610 of the Laws of 1866 provided that the boards of supervisors of the several counties might levy and collect the

amounts assigned to the towns and cities, etc., by the commissioners under chapter 744 of the Laws of 1865 for the erection of the Hall of Military Record. "But no tax shall be assessed and levied upon the property of any town until the supervisor thereof shall produce to the said board some resolution or other expression from his town or its officers in favor thereof.

Section 3 provides that moneys so contributed should be paid over to the treasurer to be deposited in the military record fund and such moneys were thereby appropriated to the erection of the Hall of Military Record.

By 1878 the new Capitol was under construction and chapter 369 of the Laws of 1878 provided:

"Section 1. The new capitol commissioners are hereby required to set apart and suitably furnish sufficient apartments in the new capitol to be known and maintained as the Hall of Military Record.

§ 2. The interest arising from the investment of the funds heretofore contributed by towns, cities and individuals, for the erection of such hall of military record, shall be hereafter devoted to the maintenance of such hall of military record."

It thus appears that the original plan was to raise moneys by public subscription, later modified to permit the raising of moneys by taxation in localities for the purpose of erecting a hall of military record.

In 1878 the Hall of Military record was provided in the Capitol and the principal of the fund was thus left unexpended and it was provided that it should be invested and the interest used to maintain the hall.

Section 1 of the 1878 statute has found its way into the Military Law where it became part of section 19 of the Military Law of 1908 and later it became subdivision 7 of section 19 of the Military Law, chapter 36 of the Consolidated Laws. (Laws 1909, chapter 41.) Section 19 was renumbered section 20 by the Laws of 1917, chapter 644, and subdivision 7 was amended by Laws 1919, chapter 180. The act as it stood from 1908 to 1919 provided for quarters in the Capitol for the safekeeping of "records, books and property, and for the display of *such* colors, standards, battle flags and relics, etc." The *such* refers back to the previous subdivisions of the same section, in which the Adjutant-General is authorized to maintain a bureau of records of the War of the Rebellion and to collect records, relics, colors, standards, etc. By

chapter 180 of the Laws of 1919 the section was amended to substitute for the words "the War of the Rebellion" the words "the wars in which the State participated."

Section 2 of the act of 1878 became section 100 of the State Finance Law of 1897 and is section 100 of the State Finance Law to-day. It provides at present:

"§ 100. Military record fund. All moneys contributed and paid over to the treasurer of the state by towns, cities and individuals for the erection of a hall of military record belong to the military record fund. Such fund shall be invested in the same manner as other state funds and a separate account thereof shall be kept by the state treasurer. The interest arising from the investment of such fund shall be used in the maintenance of such quarters in the state capitol as shall be set apart for the safe keeping of military records, books and property, and for the display of colors, standards, battle flags and relics, which is known as the hall of military record."

Chapter 668 of the Laws of 1920 authorizes the Superintendent of Public Buildings, on stated conditions, to remodel and furnish a room in the Capitol suitable for the preservation and display of military and naval relics, at a total cost not to exceed \$100,000, which room shall be known as the flag room and shall be a part of the Hall of Military Record. The act goes on to provide that the military record fund "is hereby made available and the State treasurer is hereby authorized from time to time, when necessary, to convert any securities in which such fund is invested into cash for the purpose of carrying out the provisions of this act, payment to be made by the Treasurer on the warrant of the Comptroller, on the certificate of the Superintendent of Public Buildings, with the approval of the Trustees of Public Buildings."

A letter from the Comptroller, dated December 4, 1920, calls attention to chapter 268 of the Laws of 1920, and points out the total amount of securities of this fund as \$36,000, with about \$4,000 in cash, while the contract has been awarded amounting to \$47,000. The letter also points out that the securities are in the hands of the Comptroller in trust for the fund and are not held by the State Treasurer, and if they were to be disposed of could not be sold at the present time for anywhere near their face value. He wishes advice as to what action should be taken on an estimate of approximately \$12,000 presented to him under the contract.

On the question of whether the fund is held in trust in such a way that the principal is not available for the purpose of establishing a flag room, it seems to me that there is no objection to this application of the fund. The moneys were originally contributed by the public, not for the purpose of constituting a fund the interest of which will be applicable to maintaining the Hall of Military Records, but for the purpose of having the principal expended in the construction of the Hall of Military Record. When the State supplied the Hall of Military Record in the Capitol, instead of using the fund for a separate building, the money was invested and the interest applied to maintaining the hall. But there is no reason in law or equity why the Legislature cannot apply the principal to the original object, that is the construction of a hall, even though that hall be in the Capitol. The original object of the fund was to create a place for the preservation of flags and relics as well as records, and the purpose of the present statute is to fit up a proper room for the flags and relics. This seems to me entirely consistent with the original purpose for which the money was raised.

The question of whether the Legislature has power to authorize the expenditure of \$100,000, without making any appropriation other than the authorization of the use of the military record fund which will not amount to half that, I have not yet looked into it carefully, but it would seem that any contract purporting to obligate the State beyond the available moneys was invalid.

Dated, January 11, 1921.

CHARLES D. NEWTON,
Attorney-General.

MEMORANDUM.

Concurrent resolution of legislature — immunity to witnesses appearing before legislative committees.

Briefly, so as to expedite an answer to the inquiry whether the Legislature may by concurrent resolution grant immunity to witnesses appearing before a legislative committee, I reply that in my judgment the Legislature cannot confer immunity by resolution.

Such immunity must arise from statute or from the Constitution itself.

The constitutional privilege found in article I, section 6 of the State Constitution, and in the Fifth Amendment to the Federal Constitution, that no person shall be compelled in any criminal

case to be a witness against himself, cannot, the courts have said, be cut down except by a promise of immunity coextensive with the constitutional privilege. To compel a complete disclosure by the witness, he must have a guarantee of immunity not only from the use of his testimony in any prosecution against him, but also immunity from prosecution with respect to any matter disclosed by his testimony. (*People ex rel. Lewisohn v. O'Brien*, 176 N. Y. 233; *Matter of Rouss*, 221 N. Y. 21, 26.)

The privilege afforded by the Constitution of refusing to testify against one's self, re-enacted in similar language in the Code of Criminal Procedure, section 10, and in the Code of Civil Procedure, section 837, has "long been regarded as a safeguard of civil liberty, quite as sacred and important as the privileges of the writ of *habeas corpus* or any of the other fundamental guaranties for the protection of personal rights." (*People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 227), and the privilege obtains in an examination before a legislative committee as well as in a court of law. (*People v. Sharp*, 107 N. Y. 427.)

The general public advantage of a complete disclosure for purposes of governmental investigation and for the enforcement of law, has, however, necessitated the exchange of this constitutional privilege of a refusal to testify for a binding promise of absolute immunity to the witness. Accordingly we find the Constitution granting immunity in cases of bribery and official corruption (article XIII, sections 3-5), and the statutes granting immunity in a great many instances to witnesses appearing involuntarily under subpoena. (Penal Law, sections 380, 381, 584, 770, 1330; Code of Civil Procedure, sections 854, 1955.)

This immunity has always been evidenced in the form of statutory law or constitutional enactment, and in view of the carefulness with which the courts have guarded the constitutional privilege of refusing to testify, and have declared that the immunity shall be commensurate with the privilege, I believe immunity cannot be effected by a promise on the part of the Legislature under its powers of investigation as a law-making body. There must be the exercise of its law-making power. In the law-making power the Governor as well as the Legislature has a part (Constitution, article IV, section 9; *People v. Bowen*, 21 N. Y. 517, 520), and if it be that the Legislature may grant immunity by concurrent resolution, that body has authority to repeal or amend our criminal laws without the participation of one part of the legislative or law-making power, namely, the Governor. That is to say, by a concurrent

resolution offering immunity, a crime of which the witness may be guilty has been written off against the offender, although the statute declares that his acts constitute a crime. This is in effect a repeal of the statute or the Constitution as the case may be, and cannot in my judgment be done except by the exercise of a power equal to that which defined the crime.

Referendum acts have behind them the same originating power, the Legislature, and the same ultimate power, the people, as do amendments to the Constitution, and yet we know that referendum acts cannot run counter to the Constitution. The same procedural method of adoption set down in the Constitution does not obtain in each. And so, although the Legislature gives life to the concurrent resolution, it cannot by concurrent resolution eliminate our laws, for laws are created by a different method than are the resolutions.

Concurrent resolutions, as I have intimated, do not rise to the order of statutory law, for all laws must be enacted by bill (Constitution, article III, sections 14, 15; *People v. Palmer*, 33 N. Y. Supp. 1088; affd. 146 N. Y. 406; Legislative Law, sections 41, 42). Under the Federal Constitution concurrent resolutions of Congress require the approval of the President and have the force of law. (Federal Constitution, article 1, section 7.) As a matter of practice, however, concurrent resolutions are not submitted to the President unless they contain material *legislative in character* (Hinds' Precedents of the House of Representatives, Vol. 4, sections 3483, 3484), which sustains my opinion that concurrent resolutions of our State Legislature cannot enact substantive law in the form of immunities because there is lack of exercise of the whole law-making power.

In my conclusion that immunity must be accomplished by statute or constitutional provision, I am fortified by the legislative practice since the adoption of the Constitution. The Legislature has always, so far as I can discover, defined the immunity by statute, and has from that early period enacted general laws to govern the power of subpoenaing and examining witnesses before legislative committees. (Sections 60, 62-a, section 4, subd. 5, Legislative Law.) Concurrent resolutions oftentimes refer to these laws as the source of power of the particular investigating committee. This practice for so long a term of years, of defining the examining powers of legislative committees by general enactments, taken in connection with the granting of immunities by statutory enactment alone, leads to the view that the Legislature itself deemed a statute

or a constitutional provision requisite to confer immunity upon witnesses. The Legislature has made its own determination of legislative power. Immunity can be granted only by an enactment of equal dignity and solemnity as the statute defining the crime from which immunity is given.

Should, therefore, a concurrent resolution incorporate an absolute immunity provision, it would be deceptive in promising that which could not be fulfilled.

Dated, January 19, 1921.

CHARLES D. NEWTON,
Attorney-General.

TO PRESIDENT PRO TEM SENATE; SPEAKER, ASSEMBLY.

MEMORANDUM.

All courts and public officers located in a city or village which has adopted an ordinance as provided in section 91 of the General Municipal Law are to be regulated by such ordinance.

On April 20, 1921, the Governor signed the Swift bill which amends section 91 of the General Municipal Law as added by chapter 70 of the laws of 1921. The amendment strikes from the section the phrase "of the city or village" so that the statute now provides as follows:

" * * * all courts and public officers and legal and official proceedings within the city or village shall be regulated by such ordinance, notwithstanding the provisions of section 52 of the General Construction Law."

In view of this amendment it appears that it is the legislative intent that *all* courts and *all* public officers located in a city or village which has by ordinance adopted the advance "standard time," as provided in section 91 of the General Municipal Law which became effective on April 20, 1921, are to be governed thereby.

Dated, April 21st, 1921.

CHARLES D. NEWTON,
Attorney-General.

PASSES TO PUBLIC OFFICERS — SECTION 5, ARTICLE 13 OF THE STATE CONSTITUTION.

The prohibition against public officers using or receiving the benefit of passes or franking privileges applies only to transportation, telegraph and telephone companies.

The prohibition against the acceptance and use of passes is contained in section 5 of article 13 of the Constitution, which was inserted in our basic law by the Constitutional Convention of 1894 and reads as follows:

"No public officer, or person elected or appointed to a public office, under the laws of this state, shall directly or indirectly ask, demand, accept, receive or consent to receive for his own use or benefit, or for the use or benefit of another, any free pass, free transportation, franking privilege or discrimination in passenger, telegraph or telephone rates, from any person or corporation, or make use of the same himself or in conjunction with another. A person who violates any provision of this section, shall be deemed guilty of a misdemeanor, and shall forfeit his office at the suit of the Attorney-General. Any corporation, or officer or agent thereof, who shall offer or promise to a public officer, or person elected or appointed to a public office, any such free pass, free transportation, franking privilege or discrimination, shall also be deemed guilty of a misdemeanor and liable to punishment except as herein provided. No person or officer or agent of a corporation giving any such free pass, free transportation, franking privilege or discrimination hereby prohibited, shall be privileged from testifying in relation thereto, and he shall not be liable to civil or criminal prosecution therefor if he shall testify to the giving of the same."

From said section it appears that no public officer, etc., shall directly or indirectly ask, demand, accept, receive or consent to receive for his own use or benefit, or for the use or benefit of another, certain things, namely, free pass, free transportation, franking privilege or discrimination in certain things, namely, *passenger, telegraph or telephone rates* from any person or corporation. Under this analysis of the said constitutional provision it appears that the prohibition contained therein applies only to passenger, telegraph and telephone rates.

In an investigation of the decisions of the courts with respect to litigation arising over this particular section of the Constitution, I find that no question has ever arisen in relation to the acceptance and use of a pass by a public official except in connection with common carriers.

Dempsey v. New York Central Railroad Co., 146 N. Y., 290.

People v. Wadhams, 176 N. Y., 9.

People v. Rathbone, 135 N. Y., 484.

In addition to the fact that I have been unable to find any decision touching the question of passes other than railroad passes, it is a matter of common knowledge that since the insertion of this provision into our Constitution, public officers throughout the State from year to year have openly and unquestionably accepted and used passes to baseball games, race tracks and other places of amusement and recreation.

Considerable weight must be given to this open and continued practice in order to determine the intent of said section 5 of article 13 of the Constitution. It has been uniformly held by our highest courts from the earliest times to the present day that the practical construction given to a constitutional provision for many years acquiesced in and acted upon unquestioned by the executive and administrative departments of the government, is entitled to controlling weight in its interpretation and has almost the force of judicial expression. (See *People ex rel. Williams v. Dayton*, 55 N. Y., 367.)

In order further to prove the correctness of the analysis of said constitutional provision which I have hereinabove given, I have investigated the records relating to the abuses and causes leading up to the enactment of said section 5 and find that the subject of passes became a matter of consideration by the Judiciary Commission of 1890, and such Commission recommended a provision that "no judicial officer shall accept from any person or corporation free transportation for himself or any member of his family over the line of any common carrier." The subject again arose in 1894 at which time it was inserted in the Constitution and was considered from two points of view, first, a provision prohibiting public officers from receiving passes from common carriers, second, a provision requiring common carriers to transport *certain* public officers free. Resolutions were introduced by Messrs. E. R. Brown, Moore, Marshall and Griswold all of which resolutions were directed to and aimed at common carriers. The resolution of Mr. Elon R. Brown was approved and reported on by the Committee on Railroads as follows:

"No public officer or person elected or appointed to a public office shall make use of, or by himself, or in conjunction with another, accept or request for himself, or for another, any free pass, free transportation, franking privilege, or dis-

crimination in passenger rates from any company or corporation. Any person who violates the provisions of this section shall forfeit his office at the suit of the Attorney-General."

It is here well to note that Mr. Brown's resolution was directed only against *passenger rates*.

In the Committee of the Whole Mr. Brown directed the attention of the Convention to the evils of the practice by the railroads of giving passes to public officers and the officers specifically mentioned by him were members of the Legislature, judges, state and local assessors and in many instances to other municipal officers. He drew the conclusion that by reason of the distribution of passes to state and local assessors the railroads were able, by such means, to control the rate of assessment of its properties. Mr. Brown's argument before the committee of the whole was confined exclusively to the question of abuse resulting from the distribution of passes by common carriers. No other corporation, society or organization was mentioned. After considerable discussion, Delegate Nicoll offered a substitute for Mr. Brown's resolution which contained the identical language of the Brown resolution with the insertion to include telegraph and telephone rates and added the following clause in relation to penalties:

"Any person who violates any provision of this section shall be deemed guilty of a misdemeanor."

There then arose an attempt by certain of the delegates to secure a further amendment to except from this prohibition judges of the Court of Appeals, justices of the Supreme Court and members of the Legislature, en route on official business. The attempts further to amend were futile, and thereafter, on motion of Mr. Choate, an additional clause amended by Mr. Goodelle was added as follows:

"Any corporation or officer or agent thereof, who shall offer or promise to a public officer or person elected or appointed to a public office, any *such* free pass, free transportation, franking privilege, or discrimination, shall also be deemed guilty of a misdemeanor and shall be liable to punishment, except as herein provided. No person or officer or agent of a corporation giving any *such* free pass, free transportation, franking privilege or discrimination hereby prohibited, shall be privileged from testifying in relation thereto

and he shall not be liable to criminal or civil prosecution therefor if he shall testify to the giving of the same."

It, therefore, appears that the resolution of Mr. Elon R. Brown, as amended by the resolution of Mr. Nicoll, together with the additions made by Mr. Choate and Mr. Goodelle, constitutes section 5 of article 13 in its present form. As I have heretofore stated, in all of the discussions of the Convention in relation to this provision no mention or reference was made to any other subject except passenger, telegraph and telephone rates.

Taking into consideration my analysis of this section, as set forth in the beginning of my memorandum, together with the decisions of the courts bearing upon this provision of the Constitution and the discussions and intent of the Constitutional Convention, which offered the same for adoption into our basic law, and the practical construction given to such section since the time of its enactment, I can reach no other conclusion than that said constitutional provision is only a prohibition as to free passes, etc., in passenger, telegraph or telephone rates.

Dated, April 29th, 1921.

CHARLES D. NEWTON,

Attorney-General.

TO HONORABLE NATHAN L. MILLER,

Governor of the State of New York.

MEMORANDUM.

Soldiers' Bonus Law — unconstitutionality — effect upon levy of direct State tax — special session of legislature.

Notwithstanding the fact that the direct State tax of 1921 carries a levy for interest upon soldiers' bonus bonds, which under the decision of the Court of Appeals cannot be issued, the entire direct tax is not necessarily unconstitutional by reason of the inclusion of this item for bond interest. By the excision of the paragraph containing the item for such interest the remainder of the direct tax statute is left operative.

Charles L. Craig, Comptroller of the city of New York, makes exposition and argument that the direct state tax imposed by chapter 396 of this past session is unconstitutional, and he presumes that the Governor will desire to call the Legislature in extra session to correct the statute. My view is that an extra ses-

sion is not necessary, and briefly, so as to expedite a reply to your inquiry, for the reasons I now state.

The direct state tax is 2.277 mills on each dollar of real and personal property in the State subject to taxation and is the total of three separate mill rates purposed to raise revenue for the general fund of the State treasury, for the payment of principal and interest on state debts and for the support of the common schools, specified in the statute separately as follows:

“For the payment of those claims and demands which shall constitute a lawful charge upon the general fund during the fiscal year beginning July first, nineteen hundred and twenty-one, forty-three ten thousandths of a mill.

For services relating to the state debt, including the annual contributions to sinking funds for the amortization of the principal of debt, the redemption of serial bonds, and interest on debt, including soldiers and sailors’ bonus bonds, seventy-seven hundred and twenty-seven ten thousandths mills.

For the support of common schools, including the payment of district and teachers’ quotas, academic quotas, nonresident academic tuition, and aid in the payment of salaries of teachers in public schools of the state, to be apportioned as provided by chapter six hundred and eighty of the laws of nineteen hundred and twenty, one and one-half mills.”

To the second item, that for the State debt service, taxing officers and bodies throughout the State are bearing attention for it includes a tax to pay the interest on soldiers and sailors’ bonus bonds which cannot now be issued, the referendum act authorizing their issue having been declared unconstitutional quite recently by our Court of Appeals as is of common knowledge.

The statute, the direct state tax, designed to raise for the total debt service of the State \$11,475,359.67 of which \$1,225,000 was six months’ interest on \$45,000,000 of five per cent soldiers and sailors’ bonus bonds as appears from part VI of the general appropriation bill of this year. (Chap. 176.)

I need hardly state the proposition for it is directly perceptible: has the legislature power to levy a tax for an unconstitutional purpose? And I need hardly express to you the answer. A tax must be for a purpose for which public moneys may be expended. (*Loan Ass’n v. Topeka*, 20 Wall. 655; *Weisner v. Village of Douglas*, 64 N. Y. 91.)

Moneys of the State contemplated to be raised by this direct tax of 1921 cannot be used to pay soldiers and sailors a bonus.

We have definite judicial direction to that effect. (*People of the State of New York v. The Westchester County National Bank of Peekskill.*) Manifestly the people cannot be taxed to sustain activities which the government may not exercise.

However, I do not follow along with Comptroller Craig's conclusion that the entire direct tax is void. Heretofore for several years past in statutes imposing a direct State tax, a rate has been fixed separately for each sinking fund (Chap. 729 of 1915; Chap. 762 of 1917; Chap. 368 of 1918; Chap. 535 of 1919; Chap. 682 of 1920.) In 1921 the tax for debt service was lumped in one rate and the sinking funds not specifically described. The former was the better practice for it distinctly stated the tax and the object to which it was to be applied, in clear consonance with article III, section 24 of the Constitution providing:

"Every law which imposes, continues or revives a tax shall distinctly state the tax and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object."

From the foregoing observation I do not mean that I believe the recital for debt service in the 1921 statute has defied the constitutional requirement. Indeed, if that question were necessarily to be discussed here, I should say the paragraph conformed to the fundamental provision. The object of the tax is sufficiently stated. It is for all state debt and for all sinking funds. These sinking funds, although required by the Constitution to be "separately kept" (Art. VII, § 5), partake of one nature, namely, State debt service; and a tax for State debt has as definite an object at least as a tax "for the credit of the general fund" which has been held sufficiently descriptive to comply with article III, section 24. (*People v. The Supervisors of Orange*, 17 N. Y. 235; *People v. Home Insurance Co.*, 92 N. Y. 328; *Matter of McPherson*, 104 N. Y. 306.)

But I disregard the proposition, being convinced that the debt service item of the 1921 statute is unconstitutional on the other and more particular ground that it includes a purpose, soldiers and sailors' bonus bonds, for which the revenues to be raised cannot be expended.

Had the taxing statute this year separately itemized the sinking funds and the mill rates therefor, it would have been easy to ignore and leave uncertified and uncollected the mill rate tax provided for the bonus bonds. Nowhere from the statute itself,

however, is the mill rate tax for the bonus bonds computable, nor are we at liberty to inspect the annual appropriation bill or arrive at the rate tax by a computation not drawn from the contents of the direct tax statute itself. "It shall not be sufficient to refer to any other law to fix such tax or object." (Art. III, § 24.) I must conclude that the whole debt service item of the statute is void.

I approach what I deem a solution which obviates the calling of the Legislature in extra session. Having expunged the third paragraph of the statute, that for the debt service, the mill rate taxes for the general fund and for the common schools remain unaffected. The statute is divisible. Judge Cardozo writing the opinion in *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N. Y. 48, 62, after finding certain items illegal in the scheme of taxing corporations on their franchise, continues in support of the remainder of the statute:

*"I find it unbelievable that a legislature willing to impose a tax with those items in, would be unwilling that the tax should stand if those items were out. Undoubtedly it wished them in if it had the legal right to keep them. To say that does not mean that rather than lose them, it would throw the project to the winds. Laws are not to be sacrificed by courts on the assumption that legislation is the play of whim and fancy. A doctrinaire emphasis on the possible rather than the probable would forbid severance at all times. No doubt it is easy, sheltering ourselves behind some implacable tenet of the separation of governmental powers, to insist upon a certainty impossible of attainment. We do small service to the state by so intransigent a pose. Our right to destroy is bounded by the limits of necessity. Our duty is to save unless in saving we pervert. When all the world can see what sensible legislators in such a contingency would wish that we should do, we are not to close our eyes as judges to what we must perceive as men. This need is all the greater in fields where the law is in a stage of transition and readjustment (Henderson, *supra*.) With the line so blurred and vague between the lawful and the unlawful, the most honestly conceived and carefully developed system of assessment may involve some element of value beyond the reach of the taxing power. I will not readily impute a desire to place the revenues of the state in jeopardy by the sacrifice of the whole whenever there is a failure of a part."*

Of course also, referring to the tax we are here discussing, the Legislature did not import that if it was unable to get the bonus bond interest, it did not care to raise revenue for the other purposes.

The opening sentence of the direct tax statute provides that "there shall be imposed, for the fiscal year beginning July first, nineteen hundred and twenty-one, taxes aggregating two and two hundred and seventy-seven one thousandths mills on each dollar of real and personal property of this State subject to taxation, for the purposes hereinafter mentioned." While this is the general taxing clause of the statute and fixes the total mill rate, it is but the statement of the "aggregate" tax; and the three subordinate paragraphs specifying the general fund purpose, the debt service purpose and the common school purpose, carrying their own rates, impose the tax as effectively to my mind as the opening clause. The Comptroller accordingly is able to certify the tax from the face of the statute after the elimination of the debt service rate, without deriving aid from outside sources which, as we have seen, is forbidden by article III, § 24 of the Constitution.

It is not too late for the Comptroller to issue new certificates to the different county legislative bodies, for I understand the actual levy of taxes, including the amounts for the State tax, does not customarily take place in up-state counties until on or after December 15th in each year, and from Comptroller Craig's letter there is yet time before October 10th for the board of estimate and apportionment of the city of New York to correct its tentative budget.

Foregoing the State tax for debt service this year, I might add, interferes not at all with the payment of principal and interest on state bonds nor with contributions to the sinking funds, for the Legislature by the appropriation bill has appropriated the necessary moneys from the general fund, and had it failed to do so the Comptroller would have been obliged to make the payments from that fund. (Constitution, article VII, § 11.) The general fund can stand this debt service until the legislature next meets in regular session.

Dated October 3, 1921.

Respectfully yours,

CHARLES D. NEWTON,

Attorney-General.

TO GOVERNOR NATHAN L. MILLER.

Workmen's compensation — maritime workers.

In view of the decision of the United States Supreme Court in the case of *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, the law as to maritime workers is in rather a chaotic condition. That decision which was made by a divided court, five to four, held that in the case of maritime injuries the remedy of the employee was in admiralty and that the Congress of the United States could not delegate to the States the right to provide for a compensation law which would apply to maritime workers.

The Court of Appeals of this State, in the cases of *Anderson v. Johnson Lighterage Co.*, 224 N. Y. 539, and *Keator v. Rock Plaster Mfg. Co.*, 224 N. Y. 540, has held that even where the injuries are sustained upon a dock, if the employment of the workmen is maritime, they are covered by the Admiralty Law and there is no remedy under the Workmen's Compensation Law.

The Court of Appeals has reiterated this doctrine in two cases lately decided, *Newham v. Chile Exploration Co.* and *Insana v. Nordenholt Corporation*. In the latter case a petition has been made for a writ of *certiorari* to review the decision of the Court of Appeals in the United States Supreme Court. Whether the United States Supreme Court will review it rests in its own discretion. If it should reverse the Court of Appeals, the dividing line between admiralty remedies and workmen's compensation would be the water line, injuries on board the vessel being in admiralty, and on the dock or pier under the Compensation Law.

Various cases have arisen in the Appellate Division as to what was and what was not maritime. In the case of *McBride v. Standard Oil Company of New York*, 188 N. Y. Supp. 90, a chauffeur was transferring barrels of oil to his employer's truck from the barge. He was standing either upon the side of the truck or upon the dock making the barrels safe at the rear end of the truck. The brake giving way, the truck rolled back pinning him at the side of the barge. He was taken to the hospital with a broken leg and died from shock following an operation. The Appellate Division held that this was not maritime and affirmed the award.

In the case of *Wildfeuer v. Miller & Gold*, 188 N. Y. Supp. 81, the captain of a barge which was tied up at a dock purchased a bed of a retail furniture dealer, and in delivering the bed on board of the barge the employee of the furniture dealer fell overboard and was drowned. In this case also the award was affirmed.

In the case of *Riedel v. Mallory Steamship Co.*, 188 N. Y. Supp. 649, an award was made to a night watchman on a pier and the award was affirmed.

In the case of *Grollman v. Schooner & Son*, claimant was a night watchman on a pile driver. He fell from a ladder and injured his ankle. In this case the award was affirmed at the November Term.

In the case of *Mangieri v. Olin J. Stephens, Inc.*, an award was made to the widow and children of an employee who was employed as a laborer in a retail and wholesale coal and wood business, but at the time of the accident he was pulling a boat up to the dock and fell overboard. Appeal has been taken to the Court of Appeals from the award of the State Industrial Commission.

In the case of *Kennedy v. Cunard S. S. Co.*, 189 N. Y. Supp. 402, it is held that a common-law action can be brought for personal injuries, but that in the trial of said action the rules of maritime law should prevail.

In the case of *Danielson v. Morris Dry Dock & Repair Co.*, 189 N. Y. Supp. 410, it is held that a ship when in dry dock for the purpose of repair is in navigable waters and subject to the Admiralty Law.

In the case of *Reinhardt v. Newport Flying Service Corp.*, the Court of Appeals has just handed down a decision holding that a hydro-aeroplane is subject to admiralty jurisdiction when it rides at anchor upon the water or is being navigated upon the water.

The only effective remedy for this state of affairs would be for Congress to pass a Workmen's Compensation Law applicable to harbor workers. Senator Johnson has introduced such a bill in the Senate and it has passed the Senate, but has not been reported to the House of Representatives and is still in committee. This again seeks to amend sections 24 and 256 of the Judicial Code so as to provide for compensation for injuries to or death of persons other than seamen. This bill would have to run the gamut of the United States Supreme Court again and might or might not be declared unconstitutional. The court is constituted differently now, Mr. Justice Taft taking the place of Mr. Justice White, and if he should vote with the four who were in favor of sustaining the amendment of 1917 it would remedy the situation. The other bill of Senator Johnson provides for a Federal Compensation Law for seamen.

Another bill has also been introduced in Congress, prepared by Mr. Sherman for the Shipping Board, and assumes to provide for

compensation for all maritime workers. The Sherman Bill provides a scale of compensation materially lower than the New York Compensation Act, and as I understand, is not so satisfactory to maritime workers as Senator Johnson's bill.

November 28, 1921.

CHARLES D. NEWTON,
Attorney-General.

**OPINIONS ON APPLICATIONS FOR LEAVE TO
COMMENCE ACTIONS IN NAME OF PEOPLE,
ETC.**

[439]

out of the funds of said corporation for their own use any sums of money or properties, whether as salaries, or special salaries, or as commissions, or as on account of alleged indebtednesses, or in any other guise whatsoever; and from proceeding to dissolve said corporation or causing any corporate actions to be taken to accomplish indirectly any or all acts sought herein to be restrained;

(f) That the charter of said corporation be vacated and the existence of said corporation be annulled and said corporation be in all respects fully dissolved, and after the payment of all just and proper debts, that the funds and assets of said corporation be distributed among its stockholders, ratably or otherwise, as justice may require;

(g) That such other and further actions and /or relief be sought in the premises as may be just and equitable and as to the Attorney-General may seem advisable, together with all costs and disbursements in respect of such action or actions.

And the petitioner offers to furnish satisfactory security to indemnify the People of the State for costs, expenses and disbursements in the event that permission to institute such an action is granted.

APPEARANCES.

Affidavits and brief were submitted on behalf of the petitioner by Hornblower, Miller & Garrison.

Sherwood E. Hall, counsel.

Reply brief and affidavits were submitted by Charles H. Hyde for the respondents.

FACTS

This corporation was organized as the Standard Pulley Manufacturing Company in 1904. The Corporation purposes were stated as follows: "Dealing in spot welding processes, inventions and machines, the promoting of same and of patents and patent rights in respect thereof, together with contracts for the use and operation of and under the same."

At present the principal place of business of this corporation is given as 69 and 75 Sixth Street, Long Island City, Queens county, State of New York.

As first organized the capital stock of this corporation consisted of 1,000 shares, par value \$100, which was issued to William C. Fischer in payment of certain alleged patents assigned to the corporation. Ten shares of the capital stock were issued to Maurice Lachman and ten shares to Lawrence Lachman, and the

remainder, 980 shares, were issued to Reginald Hawley, a son-in-law of Maurice Lachman. These three men constituted the first board of directors of this corporation.

On November 9, 1905 the capital stock was increased to 10,000 shares, par value of \$100 each, and pursuant to contract dated November 18, 1905 the 9,000 shares of additional capital stock were issued to Lawrence S. Lachman for certain alleged patent rights assigned by him to the corporation. The certificates for the 9,000 additional shares of capital stock were issued to the following named persons:

Joseph Salomon.....	500	shares.
Amelia Salomon.....	1100	"
Myrtle Hawley.....	1650	"
Maurice Lachman.....	665	"
Lottie Torpey.....	25	"
Emma Fischer.....	4	"
F. S. M. Blum.....	25	"
L. S. Lachman.....	2751	"
Reginald Hawley.....	280	"
Treasury fully paid for benefit of the Company.	2000	"
Total.	9000	"

The corporate name was changed to the Universal Electric Welding Company in January, 1907. Maurice and Lawrence S. Lachman each from time to time were voted stock, money and salary by the board of directors, which at all times seemed to be under their control. In many respects they treated this corporation and its assets as their private property.

On November 9, 1905, Maurice Lachman was given 250 shares of the capital stock in consideration for the development of the Company and time devoted to its purposes. At this time the capital stock consisted of 1,000 shares, issued, as above stated, to Hawley and the Lachmans. There was no extra capital stock to be issued, and probably no harm would have been done by the issuance of these additional shares of stock except that at a later date Mr. Lachman was credited upon the books of the company with the sum of \$25,000 for the return of this stock to the company.

On November 28, 1905, Maurice Lachman was voted \$36,000 for money expended for the company up to November 1, 1905, to be paid as follows: 600 shares of treasury stock at \$50 per share and \$6,000 in cash.

On December 24, 1909, Maurice Lachman sold to the company certain alleged patents for \$100,000, payable 750 shares of capital stock and \$25,000 cash or American Pulley stock at \$50 per share and \$12,500 in cash. He took the Pulley Company stock of 250 shares. How this transaction was completed upon the books even the accountants are unable to determine. Both sides in this controversy treat the unpaid balance as a credit to Lachman upon the books of the company and against which is charged from time to time money and stock withdrawn from the assets of the corporation.

On December 27, 1911, the directors of the corporation, in consideration for the assignment of patent No. 1,012,867 to the corporation by Maurice Lachman, voted to pay him \$5,000 in cash and to issue to him 200 shares of the capital stock at par.

The adjustment account of the corporation in April, 1914, shows a credit to Maurice Lachman for 230 shares of the capital stock of the corporation, amounting to \$23,000. This sum was credited to Lachman and debited to capital and surplus, which seemed to be the usual method by means of which Lachman used the funds of this company for his own personal convenience and purposes. There are several instances in the record where he has been credited with par value of the stock from time to time issued to him.

On January 19, 1910, the board of directors voted to pay salaries from 1905 to 1910, inclusive, as follows: Maurice Lachman, \$74,000; L. S. Lachman, \$9,800; Reginald Hawley, \$22,250. The salaries subsequent to that time were fixed by resolution as follows: Maurice Lachman, president, \$10,000; Reginald Hawley, vice president, \$6,000; L. S. Lachman, secretary and treasurer, \$3,000.

The petitioner contends that up to the year 1912 there was an overdraft in the salary account of Maurice Lachman of \$7,019.50. Lachman asserts that this amount, with the sum of \$750 overdrawn by Hawley, was covered in a note given by him to the company and which he afterward paid. From the records I am unable to ascertain whether that account was ever paid or not. Nothing appears in the account submitted other than the statement of Mr. Lachman.

Between the accountants for the respective parties to this proceeding there seems to be a wide difference concerning the items and balances in the salary accounts of the several officers of this company, and I do not deem it necessary for the determination of this matter to attempt to reconcile or determine which contention is

correct. It is, however, undisputed that Maurice Lachman and Lawrence S. Lachman have been paid substantial sums for salary and have been credited with and paid large sums in cash and stock for patents sold by them as individuals to this company during the time that they have been officers of and in control of the board of directors of this corporation. Various items are charged to patents, suspense and profit and loss accounts, so that it is practically impossible to pass upon these items understandingly, and for that reason all further discussion of these items has been omitted.

The Lachman Manufacturing Company was organized to promote certain patents of Lachman. This company was financed by Mrs. Jennie Sorg, and 5,000 shares of its capital stock were turned over to the Universal Electric Welding Company for certain patents and inventions. The Universal Company undertook to manufacture certain machinery, but being without the necessary funds the Lachman Company loaned some one, either the Universal Company or Lachman, \$45,000, which was subsequently paid by the surrender of the 5,000 shares of stock of the Lachman Company. Lachman claimed that the loan of \$45,000 was made for the benefit and use of the Universal Company. The petitioner asserts that the loan was a personal loan to Lachman and cancelled by the delivery of the stock of the Lachman corporation to Mrs. Sorg. Mr. Lachman states in his affidavit that by reason of the call of this loan he was obliged to sacrifice \$62,000 worth of the Universal capital stock.

By reason of certain contract relations with the Structural Pressed Steel Company the Universal corporation expended \$35,064.46 in experiments, for which it was paid the sum of \$20,000. This was another experiment of Lachman's, who claimed that the balance on this account has been paid. As to the truth of that assertion I am unable to determine.

The Universal Oil Converter Company was organized to develop a patent by means of which internal combustion engines could be run on kerosene or cheaper oil. The Steel Company entered into a contract with the Universal Company dated April 25, 1911, whereby the Universal Company was to expend the sum of not to exceed \$10,000 in the manufacture and improvement of this device. The books of the Universal Electric Welding Company show that \$80,277.42 has been expended by it on this account, notwithstanding the limitation imposed by contract between the companies.

As early as June, 1905, and from time to time since then the Lachmans and the Universal Electric Welding Company have had

contract relations with the Thompson Electric Welding Company, afterward known as the Thompson Spot Welding Company, a Massachusetts corporation. The contracts and engagements entered into between the several parties prior to January 1, 1918, were to the advantage and benefit of the Universal Company.

On March 15, 1918, these two corporations and the Lachmans entered into a new contract whereby valuable rights were transferred to the Thompson Spot Welding Company, which was to make certain annual payments to the Universal corporation and the Lachmans. Various obligations were assumed by the respective parties, among which was the stipulation that the Thompson Spot Welding Company had the right to penalize the Universal Company to the extent of 75 percent of the sums advanced to it pursuant to that contract. These penalties were imposed for failure to perform certain details of work over which the Lachmans evidently had the management and control, and for which they were paid an annual salary by the Thompson Spot Welding Company. As a part of the consideration for this contract the Thompson Spot Welding Company issued and delivered to the Universal Company 3,500 shares of its preferred capital stock at \$100 per share.

The statement of debits and credits between these companies as of June 30, 1920, shows that \$7,968.72 was the total balance taken as income for the Universal Company from the date of that contract. This balance was the result of the deduction of the sum of \$23,906.16 from the total sum paid to the Universal Company by the Thompson Company. The amount of this penalty was paid to the Thompson Company in its capital stock at \$60 per share. The evidence does not show the market value of the Thompson Spot Welding Company stock at this time.

Moody's Manual, 1920, shows M. Lachman as one of the directors of the Thompson Spot Welding Company. Mr. Lachman, however, denies that he has any interest in the Thompson Company.

A statement submitted on behalf of the petitioner shows that the preferred stock of the Thompson Spot Welding Company to the extent of 3,257 shares has been sold for \$115,445.50 less than par value since it was issued to the Universal Company. Whether or not the sale of the stock of the Thompson Company at that figure was to the advantage of the Universal Company is one of the points of difference between the petitioner and the respondents in this proceeding. It is evident, however, that since the making of the last contract between these two corporations the returns from the operation of the Universal Company have steadily declined.

The greater number of the official acts of Maurice Lachman were ratified by the Board of Directors alone, and the record does not disclose any participation on the part of the petitioner which would prevent her instituting an action to protect any interest she may have in the controversy. The earnings of this corporation seem to have been largely from the efforts of Lachman and his son, but the extensive dealings of themselves, as individuals, with themselves and others, as directors and officers of this corporation, are properly subject to judicial review.

REPORT.

This application is made pursuant to section 304 of the General Corporation Law, which is as follows:

“Sec. 304. *When attorney-general must bring certain actions.* Where the attorney-general has good reason to believe, that an action can be maintained in behalf of the people of the state, as prescribed in articles fifth, sixth or seventh of the chapter, except section one hundred and thirty of this chapter, he must bring an action accordingly, or apply to a competent court for leave to bring an action, as the case requires; if, in his opinion, the public interests require that an action should be brought. In a case where the action can be brought only by the attorney-general in behalf of the people, if a creditor, stockholder, director or trustee of the corporation, applies to the attorney-general for that purpose, and furnishes the security required by law, the attorney-general must bring the action, or apply for leave to bring it, if he has good reason to believe, that it can be maintained. Where such an application is made section nineteen hundred and eighty-six of the code of civil procedure applies thereto, and to the action brought in pursuance thereof.”

Articles 6 and 7 of the General Corporation Law do not seem to be applicable to the facts above stated. Therefore, the authority for an action or cause of action on behalf of the petitioner is evidently contained in section 90 of the General Corporation Law as follows:

“Sec. 90. *Action against officers of corporation for misconduct.* An action may be maintained against one or more trustees, directors, managers, or other officers of a corporation, to procure a judgment for the following purposes, or so much thereof as the case requires:

1. Compelling the defendants to account for their official conduct, including any neglect of or failure to perform their duties, in the management and disposition of the funds and property, committed to their charge.

2. Compelling them to pay to the corporation, which they represent, or to its creditors, any money, and the value of any property, which they have acquired to themselves, or transferred to others, or lost, or wasted, by or through any neglect of or failure to perform or by other violation of their duties.

3. Suspending a defendant from exercising his office, where it appears that he has abused his trust.

4. Removing a defendant from his office, upon proof or conviction of misconduct, and directing a new election to be held by the body or board duly authorized to hold the same, in order to supply the vacancy created by the removal; or, where there is no such body or board, or where all the members thereof are removed, directing the removal to be reported to the governor, who may, with the advice and consent of the senate, fill the vacancies.

5. Setting aside an alienation of property, made by one or more trustees, directors, managers or other officers of a corporation, contrary to a provision of law, or for a purpose foreign to the lawful business and objects of the corporation, where the alienee knew the purpose of the alienation.

6. Restraining and preventing such an alienation, where it is threatened, or where there is good reason to apprehend that it will be made.

7. The court must, upon the application of either party, make an order directing the trial by a jury of the issue of neglect or failure of defendants to perform their duties; and for that purpose the questions to be tried must be prepared and settled as prescribed in section nine hundred and seventy of the code of civil procedure.

As to any litigation pending prior to September one, nineteen hundred and seven, the provisions of this section as they existed prior to that date shall apply."

Section 91 of the General Corporation Law provides:

"Sec. 91. *Who may bring such an action.* An action may be brought, as prescribed in the last section, by the attorney-general in behalf of the people of the state, or, except where the action is brought for the purpose specified in sub-

division third or fourth of that section, by a creditor of the corporation, or by a trustee, director, manager, or other officer of the corporation, having a general superintendence of its concerns."

Although there is no public interest involved in this matter save such as might exist in the conduct of any private corporation, the Attorney-General may institute an action if he so elects.

People v. Ballard, 134 N. Y., 269.

With no direct public interest involved, the power conferred on the Attorney-General should not be exercised unless his failure to act would protect wrongdoing. When the petitioner has a remedy it is a proper exercise of his discretion for the Attorney-General to decline to act. This seems to be a case of that character. If any cause of action exists in the facts submitted upon this application it is one in favor of the corporation, and the petitioner after proper demand can maintain such an action in behalf of herself and others similarly situated without the intervention of the Attorney-General.

Niles v. New York Central & Hudson River Railroad Company, 176 N. Y., 119.

Continental Securities Company et al. v. Belmont et al., 206 N. Y., 7.

Consequently, I deem it advisable to withhold my approval of this application, which is hereby denied.

Dated, Albany, N. Y., May 27, 1921.

GLENN A. FRANK,

Deputy.

Approved and application denied.

CHARLES D. NEWTON,

Attorney-General.

BEFORE THE ATTORNEY-GENERAL

In the Matter of The Application of LOU B. CLEVELAND for the Commencement of an Action to dissolve the SYRACUSE AND SUBURBAN RAILROAD COMPANY and forfeit its corporate rights, privileges and franchises.

This is an application to dissolve a street railroad corporation upon the grounds of insolvency.

The petitioner appeared in person and by Paul S. Andrews, counsel.

The respondent appeared by C. Loomis Allen, vice-president, and William P. Gannon, counsel.

FACTS

The Syracuse and Suburban Railroad Company has existed for more than twenty years and operates a street railroad system from Syracuse southeasterly to and through Fayetteville and Manlius to Edwards Falls, about twelve miles. In connection with this main line is a branch extending southerly from Orville to Jamesville. The company is capitalized as follows: Common stock \$400,000, first mortgage bonds due 1927 \$400,000, second mortgage bonds due 1953, \$150,000. The operation of the road for twelve years prior to June 30, 1920, resulted in earnings permitting an average of \$39,160 per annum, applicable to capital. The dividends for twenty-one years aggregate \$54,000. The valuation of the property of the company and franchises was not shown upon the hearing so that it is impossible to determine whether or not the liabilities of the company exceeds its assets. A considerable amount of testimony was offered to show that by reason of certain orders of the Public Service Commission and the physical condition of the property of the company, a considerable sum of money must be spent in the near future and that the company with only \$3,000 cash on hand had no immediate means of meeting these charges. The company had a deficit of \$31,500 for the year 1920 and the coupons on the first and second mortgage bonds for November, 1919, May and November, 1920, have not been paid. This failure to pay interest is the only positive proof offered indicating insolvency. A large number of these coupons, the proportion undetermined, have been held as security for a loan pursuant to arrangements made by a reorganization committee which is now endeavoring to finance the company by means as yet undisclosed. It may be possible that the interest

unpaid on these bonds, fixed charges, and necessary improvements will ultimately involve the company to such an extent that its financial condition will be hopeless. However, this application is made by a holder of bonds purchased within three months previous to beginning this proceeding for the purpose of qualifying himself as a creditor of the company. He is interested in an existing or proposed bus line to serve the communities reached by the Syracuse and Suburban Railroad Company. There are no other persons, creditors or stockholders appearing in this matter or urging action against the company which is under the supervision of the Public Service Commission of the State of New York and subject to its orders.

REPORT

The sole grounds set forth by the petitioner herein for the commencement of an action for the dissolution of the Syracuse and Suburban Railroad Company is for alleged insolvency which has not been established to my satisfaction. The evidence discloses a condition where insolvency to the extent required by the statute is likely to result unless immediate steps are taken to alleviate the financial stress impending. The petitioner as a mortgage creditor has an adequate remedy to protect his interests. The public interests involved in determining this application require me to decide this matter in a manner to best promote the public welfare. The communities reached by this corporation are entitled to such service as it may be able to render and until the time arrives when the residents of these communities or the public officials having to do with the rendering of such service by this corporation request my official action, I am constrained to withhold my approval of the application of the petitioner herein, which is hereby denied.

Dated, May 24, 1921.

GLENN A. FRANK,
Deputy Attorney-General.

Approved:

CHARLES D. NEWTON,
Attorney-General.

BEFORE THE ATTORNEY-GENERAL

In the Matter of the Application of EMANUEL ZIMMET and MORRIS I. GARSHELIS for leave to institute an action for a dissolution of THE ELECTRIC TRADING COMPANY.

Application by the above named Emmanuel Zimmet and Morris I. Garshelis for the commencement of an action in the name of the People against The Electric Trading Company for a dissolution thereof upon the ground that it has suspended its ordinary and lawful business for upwards of a year.

Petitioner appears by David J. Rosen.

No appearance by the respondent.

FACTS

It appears from the petition and evidence offered in support thereof as follows:

First. That on May 26, 1918, a corporation was formed under the corporate name of The Electric Trading Company for business purposes, with a capital of one thousand dollars (\$1,000.00), consisting of one hundred (100) shares of stock, and the duration of such corporation was stated to be for twenty-five (25) years. The principal place of business of such corporation was given in the certificate of incorporation to be situate in the Borough of Manhattan, city, county and State of New York. The subscribers to the articles of incorporation were Edward McAviney, 136 Liberty street, New York City; Jason G. Lamison, 2 Rector street, New York City, and Timothy A. Leary, 2 Rector street, New York City.

Second. It appears that the last known place of business of said corporation was 114 Liberty street, New York City, and that F. C. Joutras was president and secretary, and T. A. Leary treasurer. That said corporation has not for more than one year last past had a place of business at the above address, and the petitioners herein have been unable to ascertain where such corporation has a place of business in the borough, city and county aforesaid. Timothy A. Leary, one of the incorporators, states that the incorporation was obtained for the convenience of one William Sheehan who died in 1914, and that he believes the corporation is now defunct. No annual reports have been filed for and on behalf of the corporation with the Secretary of State, as provided by law, and the corporation has been delinquent in its reports to the State Tax Commission since 1915.

Third. That a copartnership consisting of Emanuel Zimmet and Morris I. Garshelis since February 27, 1920, has been engaged in the electric trading business at 368 East 149th street, Borough of Bronx, city and county of New York, under the firm name and style of Electric Trading Company, and desire to incorporate under that name but are unable to do so by reason of the similarity of the name under which they desire to incorporate and the name of the defunct electric trading company.

REPORT

Inasmuch as The Electric Trading Company has ceased to do any business for upwards of a year, and has suspended its ordinary and lawful business for a considerable period of time and is delinquent in filing its reports with the State Tax Commission as required by law, and in filing the annual report with the Secretary of State, also provided by law, it is brought squarely within the provisions of section 101 of the General Corporation Law, and can and should be dissolved.

I, therefore, recommend that an action be brought in the name of the People against this corporation for a dissolution thereof upon Emanuel Zimmet and Morris I. Garshelis executing and filing in this department a bond to be approved by me, to save and protect the State from all costs and damages that may accrue against it, if any, and assent to the terms and provisions of the stipulation appended to such bond.

Dated, April 21, 1921.

GLENN A. FRANK,
Deputy.

Approved:

CHARLES D. NEWTON,
Attorney-General.

BEFORE THE ATTORNEY-GENERAL

Hearing held March 28, 1921.

Application for permission to commence proceedings under Section 1948 of the Code of Civil Procedure on the relation of NICHOLAS A. DE JOHN against FREDERICK E. LYTTLE.

This is an application made by Nicholas A. De John who claims to have been elected to the office of trustee of the first district of the village of Lyons, for the commencement of an action in the

nature of *quo warranto* against Frederick E. Lytle to try the title to such office and to oust and exclude said Frederick E. Tytle from such office.

APPEARANCES.

Charles T. Ennis, Esq., Attorney for Petitioner,
Charles Platt Williams, Esq., Attorney for Respondent.

FACTS.

At the charter election of the village of Lyons, Wayne county, on the 8th day of March, 1921, the petitioner and respondent were rival candidates for the office of village trustee for a term of two years.

Upon the completion of the canvass of the ballots cast at such election it appeared that the petitioner, Nicholas A. De John, received one hundred and sixty votes and the respondent, Frederick E. Lytle, forty-four votes.

The board of trustees convened as a board of canvassers on the 9th day of March, 1921, at 9 A. M. and passed the following resolutions:

“Resolved, That this board finds the following facts: that Nicholas A. De John is not the owner of any property assessed to him upon the last preceding assessment roll of the village of Lyons and is ineligible to hold office of trustee of said village. * * * That Frederick E. Lytle received the second highest number of votes cast for the office of trustee of the first district, and

Resolved, That Frederick E. Lytle be and hereby is declared elected trustee of and in the first district for the ensuing year.”

That said Frederick E. Lytle, pursuant to the resolution adopted by the board of trustees acting as board of canvassers has taken the oath of office and is now in possession of and performing the duties of trustee of the first district of the village of Lyons.

There is no dispute about the number of votes which each candidate received, and it is conceded that said petitioner, Nicholas A. De John, received one hundred and sixty votes, and the respondent, Frederick E. Lytle, forty-four votes, and that Mr. De John had a majority of one hundred and sixteen votes.

It also appears by documentary evidence and testimony presented before me by the petitioner, and it is not denied by the

respondent, that the petitioner is the owner of an undivided one-fourth interest in real estate located in the village of Lyons, consisting of a double house on Shuler street and two vacant lots, one on William street and one on Shuler street; that the other owners of this real estate are his three brothers, Philip, Roy and Michael; that his ownership in this real estate was delivered under two separate deeds, one dated September 22, 1915, from Frank De John and Filimena De John, recorded in Wayne county clerk's office, November 30, 1915, in Book 238 of Deeds at page 374; one from Frank De John, widower, dated July 22, 1917, and recorded in Wayne county clerk's office September 18, 1917, in Book 244 of Deeds at page 587; that the petitioner, Nicholas A. De John has continued to be the owner of this undivided one-fourth interest in said properties and was such owner at the time of village election on March 8, 1921, and that his ownership has continued without change to this date.

That the petitioner's name appeared on the village assessment-rolls as one of the owners of such properties for the years of 1918 and 1919; that the taxes were paid by the petitioner.

In the year 1920 a new board of assessors prepared the assessment-roll for that year, such board consisting of Frederick E. Lytle, who is the respondent herein; Frederick C. Peer and B. A. Czerney, and in the preparation of this new assessment-roll for the said village the name of Nicholas A. De John as one of the owners of the properties above mentioned was omitted therefrom and in place thereof the properties were assessed to Frank De John, who is the father of the petitioner herein and a tenant and occupant of the premises, and had so been a tenant and occupant of the premises from the time it was originally conveyed to the petitioner in the year 1915.

OPINION

The sole question for consideration upon this application is as to the eligibility of Nicholas A. De John to hold the office of village trustee from the first district of the village of Lyons, N. Y. It has been established that he received a majority of the votes cast for the office, in fact, his majority was practically three-fifths of the total number of votes cast. Certainly the wishes of such a large majority of the electors at such election should prevail and be given effect unless it appears that said petitioner is clearly ineligible to hold the office.

The village of Lyons is incorporated under a special act being chapter 750 of the Laws of 1907. Section 9 of said act prescribes the eligibility to office as follows:

“ A president or trustee hereafter elected must at the time of his election * * * be the owner of property assessed to him on the last preceding assessment roll, and must also be the owner during the term of his office of property assessed to him on the assessment roll of the said village.”

It, therefore, appears that eligibility to hold office in the village of Lyons, under the special charter, is identical with the requirements to hold office contained in section 42 of the General Village Law.

It is to be noted that these requirements provide not only that a trustee shall be the owner of property, but that it must be assessed “ to him ” on the last preceding assessment-roll. The reason why the board of canvassers of the village of Lyons for the election held March 8, 1921, declared Nicholas A. De John, the petitioner, ineligible to hold the office of trustee was that his name did not appear upon the last preceding village assessment-roll.

It appears from the evidence submitted and uncontradicted that the petitioner was the owner of real estate in the village of Lyons at the time of the election on March 8, and had been continuously the owner of real estate within such village since 1915, and that his name had appeared upon the assessment-rolls of 1918 and 1919, but in the year 1920 a new board of assessors prepared the assessment-roll and the field-books upon which the assessment-roll was predicated and because of the omission, error or negligence of the new board of assessors the name of the petitioner was omitted from said 1920 assessment-roll. There is ample authority holding that if the name is once upon the assessment-roll, and is omitted therefrom through no fault of the property owner, that the said property owner should not be deprived of any of his rights, political or otherwise, by reason of such omission on the part of the assessors in charge of the preparation of such assessment-roll. *In the Matter of the Application of Isaac Abrahams v. Joseph Mitchell*, Attorney-General Carmody in his opinion on such application stated:

“ In this case the incumbent possessed as a matter of fact all of the qualifications which the purposes of the law intended that he should possess, and he should not suffer by the action of the assessor in failing to properly assess his property. If the rule were otherwise, an assessor could disqualify

any inhabitant from holding the principal offices of the city by the simple device of not including his name upon the assessment roll, an omission which might not be noticed by the party affected until too late to remedy it."

Also, see *Jewell v. Mohr*, 136 N. Y. Sup. 273, in which Judge Wheeler, writing the opinion, stated:

"It might well be held, we think, in addition, that the object and purpose of the village law, section forty-two, is simply to insure that those elected as trustees of the village shall be property owners and tax payers of the village, to the end that they may have the proper interest in the village welfare and prosperity."

True it is, however, that the language of Judge Wheeler, above quoted, was *obiter dictum* for the reason that the court in the following paragraph held that it was not necessary for him to go to that extent, for the reason that there were other objections which were fatal to the continuance of the proceeding.

It appears from the petition herein presented and from the documentary and oral testimony produced before me on behalf of the petitioner that the omission of the name of Nicholas A. De John from the 1920 assessment-roll of the village of Lyons was an error on the part of the assessors and through no fault of the petitioner. If reasonable care had been exercised in the preparation of said 1920 assessment-roll the petitioner's name would have appeared thereon and no question would have arisen as to his eligibility to hold the office of village trustee. Such omission was caused and such error was committed either intentionally, which I would not for a moment impute or believe, or by the neglect of those in charge of the assessment-roll to study or compare the 1919 field-books and assessment-rolls or to make inquiry of the occupant of the premises as to the ownership of said premises.

It appears to me that this application comes clearly within the rulings laid down in the opinion of Attorney-General Carmody and *Jewell v. Mohr, supra*.

The courts have given a very broad and liberal construction to statutes prescribing the eligibility of persons to hold office, to the end that where a candidate has been elected by the people to an office requiring a property qualification he should not be deprived of the office when he is in fact the possessor of all of such qualifications except the omission of some mere clerical act on the part of a third person. Certainly the omission of the name of the petitioner

on the 1920 assessment-roll through the error of the board of assessors for that year should not be upheld as a reason to deprive the electors of such district of a representative receiving so great a majority over his opponent, wherein it is conceded that the petitioner possesses all of the necessary qualifications except the mere fact that his name was omitted from said assessment-roll.

I, therefore, rule that the application be granted and that the petitioner be allowed to bring an action in the name of the people upon his relation to oust and exclude the respondent from the office of village trustee for the first district of the village of Lyons, upon the usual conditions as to the designations of an attorney and the giving of a bond to protect and save the people harmless from all costs and damages.

Dated, March 29th, 1921.

ARTHUR E. ROSE,
Third Deputy.

Approved and application granted.

CHARLES D. NEWTON,
Attorney-General.

BEFORE THE ATTORNEY-GENERAL

In the Matter of the Application of WILLIAM L. HOWLAND for the commencement of an action for the dissolution of the CENTURY MANUFACTURING CORPORATION upon the grounds that it has suspended its ordinary and lawful business for more than one year.

On reading and approving the report of Glenn A. Frank, Deputy Attorney-General, upon the above entitled application, I do hereby

Order and direct that an action be commenced by and in the name of the People of the State of New York against the Century Manufacturing Company, a domestic corporation, for the dissolution thereof, upon the ground that it has suspended its ordinary and lawful business for several years last past, and Fred W. Thomas, 504 Liberty Building, Buffalo, N. Y., is hereby designated to commence and prosecute such action in my name as Attorney-General, but without compensation from the State of New York, upon the executing and filing by W. W. Carlisle of a bond, with sufficient surety, in the penal sum of \$250 to be approved by me, to save and protect the State from all costs and damages grow-

ing out of said action, and upon the said W. W. Carlisle and said Fred W. Thomas assenting to the terms and conditions of the stipulation appended thereto.

Dated April 12, 1921.

CHARLES D. NEWTON,
Attorney-General.

BEFORE THE ATTORNEY-GENERAL

In the Matter of the Application of WILLIAM L. HOWLAND for the commencement of an action for the dissolution of the CENTURY MANUFACTURING CORPORATION upon the grounds that it has suspended its ordinary and lawful business for more than one year.

No appearances.

Petition filed by Fred W. Thomas, attorney.

FACTS

It appears from the verified petition of William L. Howland as follows:

1. That on January 15, 1901, a corporation was formed under the corporate name of the Century Manufacturing Company for the purposes permitted under the Business Corporation Law of the State of New York; that its principal place of business was in the city of Mechanicville, Saratoga county, New York; that Joseph H. Packer and William R. Mosher and the petitioner were the principal stock holders, officers and directors of the said corporation during all of the time that the corporation continued in business. That in the year 1908, the business of the corporation was disposed of and the corporation ceased to do any business pursuant to the articles of its incorporation or otherwise. That all of the debts of the corporation were at that time paid in full and the assets distributed among the stockholders and the company has not since engaged in any business whatsoever. The corporation has no debts and no assets and the petitioner is unable to find any of the books of account, stock books, records or papers of said corporation of any name or nature and believes that such records and documents have been destroyed. Joseph H. Packer, one of the incorporators, died in 1902 and William H. Mosher, another, died in 1919.

2. From communications from the counsel for the petitioner accompanying the petition in this matter, it appears that W. W. Carlisle of the city of Buffalo, who has been conducting a business for fifteen years under the name of the Century Manufacturing Company, desires to incorporate and use the name of Century Manufacturing Company which he is unable to do by reason of the incorporation of the company mentioned and described in the petition.

REPORT

Inasmuch as the corporation Century Manufacturing Company, heretofore and during the year 1908 ceased to do business and at all times since has suspended its ordinary and lawful business, it is brought squarely within the provisions of section 101 of the General Corporation Law and can and should be dissolved if the facts are established upon the trial as set forth in the verified petition. Since it appears that the petitioner is the sole surviving officer and stockholder of the company, I recommend that an action be brought in the name of the People of the State of New York against this corporation for a dissolution thereof upon the executing and filing in this department of a bond by W. W. Carlisle with sufficient sureties, to be duly approved, to save and protect the State from all costs and damages that may accrue against it if any, and assent to the terms and provisions of the stipulation appended to such bond.

Dated April 12, 1921.

GLENN A. FRANK,
Deputy Attorney-General.

Approved:

CHARLES D. NEWTON,
Attorney-General.

In the Matter of the Application to the ATTORNEY-GENERAL of the State of New York to bring an action to dissolve THE NATIONAL GRAIN Co., INC.

REPORT

The National Grain Company, Inc., was incorporated under the Laws of the State of New York on or about March 11, 1914.

The officers and directors of said corporation are Morris Gross, Samuel Gross and Samuel S. Rosenberg.

Said corporation commenced business at the Produce Exchange Building, city of New York, but became inactive within a period of a few months after its incorporation, and for upwards of six years has transacted no business of any nature whatsoever, and it is not now transacting or carrying on any business.

The National Grain Corporation is a corporation duly organized and existing under and by virtue of the Laws of the State of Connecticut and has made application to the Secretary of State of the State of New York for permission to do business in this State. The said application was refused by reason of the existence of a National Grain Company, Inc., a New York corporation. The president of the National Grain Corporation, David Feuer, now petitions the Attorney-General to bring an action pursuant to section 101 of the General Corporation Law of the State of New York to dissolve the National Grain Company, Inc., on the ground that said National Grain Company, Inc., has suspended its ordinary and lawful business for at least one year.

The hearing on said petition, after notice to the National Grain Company, Inc., established the facts as contained in the petition.

I recommend that the relief prayed for in the petition be granted.

New York, July 21, 1921.

Respectfully submitted,

ROBERT BEYER,
Deputy Attorney-General.

BEFORE THE ATTORNEY-GENERAL.

In the Matter of the Application of DAVID FEUER for the commencement of an action to dissolve the NATIONAL GRAIN COMPANY, INC.

On reading and filing the report of Robert P. Beyer, Deputy Attorney-General, dated July 21st, 1921, which has been duly approved by me, I do hereby

Order and direct that an action be commenced in the name of the People against the National Grain Company, Inc., for the dissolution thereof, pursuant to the provisions of section 101 of the General Corporation Law, upon the petitioner executing and

filing with me a bond in the penal sum of two hundred and fifty dollars (\$250), to be approved by me, to protect the State against all costs and claims growing out of such action.

Dated, September 21st, 1921.

CHARLES D. NEWTON,
Attorney-General.

BEFORE THE ATTORNEY-GENERAL

In the Matter of the Application of ROBERT WALKER to the Attorney-General of the State of New York, to bring *Quo Warranto* Proceedings under Section 1948 of the Code of Civil Procedure against REGINALD W. PRESSPRICH to contest his election as Trustee of the village of Rye, N. Y.

This is an application to the Attorney-General, as stated in the petition, "for permission to institute proceedings in the nature of *quo warranto* to contest the election of Reginald W. Pressprich as a trustee of the village of Rye, New York."

It may be assumed that it is the intention of the petitioner to apply to have the Attorney-General bring an action pursuant to the provisions of section 1948 of the Code of Civil Procedure against Mr. Pressprich as one unlawfully holding a public office.

The facts as they appear in the petition and answer and from the statement of counsel on the hearing are as follows:

The election for village trustee was held on June 21st, 1921. Prior thereto and on June 6th, 1921, a certificate of nomination was filed nominating Robert Walker for the office of village trustee. On June 11th, 1921, a second certificate of nomination was filed nominating Mr. Pressprich.

Section 128 of the Election Law, as amended by chapter 298 of the Laws of 1918, requires such certificates of nomination to be filed "at least fifteen and not more than thirty days before the day of election." The Pressprich certificate was therefore not filed within the required time. The village clerk, however, received the certificate and the name of Mr. Pressprich was printed, together with the name of Mr. Walker, upon the official ballot and presented to the voters on Election Day. No objection to the Pressprich certificate was filed with the clerk and no proceedings taken to have the name of Mr. Pressprich stricken from the ballot. At the election Mr. Pressprich received 429 votes and

Mr. Walker 370 votes. The votes were duly canvassed and a certificate of election issued to Mr. Pressprich, who has filed his oath of office and is now acting as Trustee of the village.

The question, therefore, presented is whether the erroneous receipt of the Pressprich certificate of nomination and the possible error in the printing of his name upon the ballot on Election Day is sufficient to invalidate the title of Mr. Pressprich to the office and to warrant the Attorney-General in the exercise of his discretion in bringing an action to have Mr. Pressprich ousted from the office.

There can be no doubt but that prior to the election an application to the court to restrain the printing of the name of Mr. Pressprich on the ballot would have been successful.

Matter of Cuddeback, 3 App. Div., 103;

Matter of Dowling, 121 App. Div., 656;

Matter of McDonald, 25 Misc., 80;

Opinion of Attorney-General, 1919, page 139.

Prior to the election the rights only of Mr. Pressprich and Mr. Walker and those who presented their names for nomination were involved. When, however, an official ballot was prepared and was presented to the voters on Election Day, there arises the necessity of considering and protecting the right of every elector to have his voting privilege respected and protected.

While authority is not conclusive upon the subject the courts have, in the absence of fraud, shown a marked disposition to hold that errors in the preparation of the ballot are to be disregarded after an election has been held. The right of the voter to have his choice respected rises superior to all technical requirements concerning the preparation of the official ballot.

“There was nothing within or upon the ballot from which a voter could know that the ballot was not made up in exact conformity to the law. It was impossible for him to ascertain from an inspection that the candidates for State and Judicial offices printed in the column of the ‘regular Democratic party’ had not been regularly nominated by that party or that the Clerk in arranging or printing the ballot had not inserted the names with full authority. The effort in this proceeding is to disfranchise innocent voters because of a latent defect in the official ballot fur-

nished by the State, not discernible on inspection, which ballot they were compelled to use, the defect consisting in the unauthorized insertion therein by a public official charged with the duty of making up and printing the ballots of names of candidates in a party column not duly nominated by such party. The intention of the voters who used this party column to express their choice is clear and admits of no doubt. * * * We can conceive of no principle which permits the disfranchisement of innocent voters for the mistake or even the wilful misconduct of election officers in performing the duty cast upon them. * * * Statutory regulations are enacted to secure freedom of choice and to prevent fraud and not by technical obstructions to make the right of voting insecure and difficult."

People ex rel. Hirsh v. Wood, 148 N. Y. 142;
 See, also, Opinion of Attorney-General, 1895, page 293;
 Opinion of Attorney-General, 1911, Vol. II., page 228;
People v. Shaw, 133 N. Y. 493;
People v. President, Etc., 144 N. Y. 616;
Matter of Town of Groton, 63 Misc. 370:

In a number of decided cases it has been held that questions involving the methods by which candidates have been nominated and their names placed on the official ballot might be passed upon by the courts subsequent to the holding of an election. It appears by inference, however, from the opinions that the courts by passing on such questions have no intention of upsetting the verdict of the elector but render the decisions only for the future guidance of those having to do with the administration of the Election Law. It appears to have been conceded that the result of the election cannot be disturbed.

Matter of Madden, 148 N. Y., 136, 139;
Matter of Cuddeback, 3 App. Div. 103, 108;
Matter of Woodworth, 64 Hun, 522, 525;
Matter of Fairchild, 151 N. Y. 359, 361.

The consideration cannot be lost sight of that the voters who cast their ballots for Mr. Pressprich accepted the only opportunity

which was presented to them. If his name had not been printed on the ballot or if they had been in any way advised that his name was improperly there they could have declared their choice by writing his name in the blank space provided for such purpose. There is no question of fraud or intentional misrepresentation on the part of those who presented the Pressprich certificate.

Prior to the amendment of section 128 of the Election Law in 1918, the statute provided that a certificate could be filed within ten days prior to the day of Election and the error of the Pressprich nominators appears to have been due only to the fact that they had not been advised of the amendment which required the certificate to be filed fifteen days before the election.

I recommend, therefore, that this application be denied.

ROBERT S. CONKLIN,
Deputy Attorney-General.

Approved this 20th day
of September, 1921.

CHARLES D. NEWTON,
Attorney-General.

In the Matter of the Application to the ATTORNEY-GENERAL to begin proceedings for the removal of ORRIN L. FORRESTER as President of O. L. FORRESTER AGENCY, INC., a corporation.

To CHARLES D. NEWTON, Attorney-General:

This is an application made to the Attorney-General to begin proceedings pursuant to the provisions of sections 90 and 91 of the General Corporation Law for the removal of Orrin L. Forrester from the office of president of said above named corporation.

It appears from the testimony offered and the exhibits received that prior to the month of July, 1921, the corporation carried an account in the Peoples National Bank of Brooklyn in which all deposits were made and on which checks were drawn signed by O. L. Forrester as president, and Max Abrams as treasurer. During the month of July those acting as officers of the corporation became involved in a controversy and an attempt was made to supplant Mr. Abrams as treasurer. He thereupon notified the bank to make no further payments out of the corporate account

until further notice. The attempt to remove Mr. Abrams was abandoned and some few weeks later he notified the bank that his order to stop payments was withdrawn.

In the meanwhile Mr. Forrester had begun to deposit all the corporate moneys in his own personal account which was kept in the same bank and to pay all corporate bills with his personal check. He continued to do this up to about the first of October when the corporation ceased to do business, although he was at various times urged to resume doing business through the regular corporate bank account. He claims to have paid out \$760.76 in excess of any moneys received on behalf of the corporation.

It appears that the corporation was engaged in the business of soliciting life insurance. At the time the corporation begun doing business in January, 1921, the corporation sought to secure an agency from the Manhattan Life Insurance Company of New York. This insurance company refused to issue a contract to a corporation and therefore, with the assent of Mr. Forrester and the others acting for the corporation, the contract was made by the insurance company with Mr. Forrester. There can be no doubt but that it was intended by Mr. Forrester and the officers of the corporation that this contract should be held by him solely for the benefit of the corporation. He did no business in his own name, all of the business being done in the name of the corporation.

In the early part of October, 1921, and at about the time this inquiry was instituted the contract between the insurance company and Mr. Forrester was cancelled and another contract issued to another individual who proceeded to carry on business with the aid and assistance of Mr. Forrester from the same offices from which the corporation had previously conducted its business and with substantially the same staff.

From these facts it appears that there was originally in July, 1921, some excuse for Mr. Forrester in the emergency with which the corporation was confronted in temporarily placing the corporate moneys in his own personal account. Immediate payment had to be made of premiums to the Manhattan Life Insurance Company, and Mr. Forrester was personally responsible on his contract with the insurance company for such premiums. After the difficulties had been disposed of, however, there is no question but what Mr. Forrester was open to censure for his failure to resume business in the regular way. So far as is shown by the evidence he has not personally profited by reason of the irregular method of carrying the bank account. Corporate officers, however, should not

take it upon themselves to deposit corporate moneys in their own personal accounts and endeavor so far as such funds are concerned to establish the relationship of debtor and creditor between themselves and the corporation.

Under the provisions of section 304 of the General Corporation Law, however, the Attorney-General is limited in the bringing of an action of this character to cases in which, in his opinion, the "public interests require that an action should be brought." It does not appear from all the circumstances that there is a sufficient public interest herein involved to warrant the bringing of an action.

Apart from that, however, the testimony shows that the corporation has been irregularly doing business. It was incorporated in December, 1920. Prior to the incorporation a meeting was held by the incorporators at which meeting it was declared to be the consensus of opinion of those present that certain persons should act as certain officers, and that there should be a certain apportionment of the stock of the corporation. Subsequent to the incorporation there was no meeting of incorporators and no meeting of any board of directors so far as appears from the so-called minutes. No by-laws were ever adopted. The persons who acted as incorporators or who had been designated as officers at the meeting held prior to the incorporation came together at irregular intervals and held meetings and transacted business without stating what they were or for what purpose they were gotten together. No officers were at any time elected. The persons designated, however, in the meeting prior to the incorporation assumed to act as officers after the incorporation and continued to do so while the corporation continued business. It is not clear, therefore, that Mr. Forrester was ever elected president or that he rightfully holds any such office.

Under these circumstances it is difficult to see how he can be removed as president. This condition of affairs, together with the absence of any general public interest, leads me to the conclusion that the application herein should be denied, and I so recommend it.

Dated, November 14th, 1920.

Respectfully submitted,

ROBERT S. CONKLIN,
Deputy Attorney-General.

Approved and application denied.

CHARLES D. NEWTON,
Attorney-General.

In the Matter of the Application to the ATTORNEY GENERAL for the commencement of an action to dissolve the KINNEY MANUFACTURING COMPANY.

A petition has been filed by the Kinney Manufacturing Company, a Massachusetts corporation, alleging, in substance, that it desires authority to do business in this State, but has been unable to obtain the same because of the fact that its name conflicts with that of a domestic corporation which has never been dissolved. The certificate of incorporation of the domestic corporation was filed March 12th, 1881, and it is alleged that one John P. Kinney, a builder in Brooklyn, operated said corporation as an adjunct to his business until 1886, since which time it has carried on no business of any kind. The petition is duly verified and accompanying the same are affidavits to the effect that the parties who were interested in the domestic corporation cannot be located, although diligent search has been made for them. In these circumstances it would seem that an attempt to give the usual notice of hearing would be useless.

Considering the matter upon papers submitted, it appears that the Kinney Manufacturing Company has suspended its ordinary and lawful business for a period of more than one year and that, therefore, an action can be maintained under the provisions of section 101 of the General Corporation Law to procure a judgment dissolving it. The petitioner has filed the usual bond and I would recommend that authority be given to commence such an action.

Dated December 29th, 1921.

ALEX T. SELKIRK,
Deputy Attorney-General.

Approved December 30th, 1921.

CHARLES D. NEWTON, *Attorney-General.*

By THOS. F. FENNELL, First Deputy.

BEFORE THE ATTORNEY-GENERAL.

In the Matter of the Application to the ATTORNEY-GENERAL for the commencement of an action to dissolve the KINNEY MANUFACTURING COMPANY.

A verified petition having been filed with me, asking that an action be commenced to dissolve the Kinney Manufacturing Company,

a domestic corporation, and it appearing from a report of Alex T. Selkirk, Deputy Attorney-General, dated December 29th, 1921, which report has this day been approved, that said Kinney Manufacturing Company has suspended its ordinary and lawful business for a period of more than one year, and it further appearing that the petitioner has filed a bond in the penal sum of \$250 in the usual form, and sufficient reason appearing therefor, I do hereby

Order and direct that an action be commenced pursuant to the provisions of section 101 of the General Corporation Law for the dissolution of said Kinney Manufacturing Company and the forfeiture of its corporate rights, privileges and franchises, and I do further order and direct that John H. Sears, an attorney having an office at No. 37 Wall street, New York City, be designated to act for and on behalf of the Attorney-General for the purpose of prosecuting such action, his services, however, to be without cost or expense to this department or to the State of New York.

Dated December 30th, 1921.

CHARLES D. NEWTON,
Attorney-General.

By THOS. F. FENNELL,
First Deputy.

**OPINIONS TO
COMMISSIONERS OF LAND OFFICE**

[471]

OPINIONS TO COMMISSIONERS OF LAND OFFICE

STATE OF NEW YORK,

OFFICE OF THE ATTORNEY-GENERAL,

ALBANY, *March 15, 1921.*

I do hereby certify that I have examined the annexed application of the Morse Dry Dock and Repair Company for a grant of land under water, for beneficial enjoyment, and certify that the same is made in accordance with the provisions of the statutes relating thereto; and also, that it is made in accordance with the rules and regulations of the Commissioners of the Land Office, in force till February 1st, 1921, except that no affidavit of freeholders as to the value of the lands under water applied for and no money offer for said grant has been presented, but, as under the new rules now in force such affidavit and offer are no longer required, I would recommend that this rule be waived in this case.

It appearing, however, that the people of the State still have certain reserved rights under a water grant, dated July 18, 1860, to Nathaniel Marsh, and under another water grant dated May 26th, 1886, to Sarah C. Brown, together covering the lands described in Parcel B of the State Engineer and Surveyor's Map accompanying this application, and which Parcel B has not been included in this application, I would recommend that following the reservation at the end of the first condition, which reserves "to the said people the full and free right, liberty and privilege of entering upon and using all and every part of the above described lands which have not been improved as aforesaid as the said people might have done had this grant not been made," there be added the following *additional* reservation, viz.:

"There is also reserved to the said people the full and free right, liberty and privilege of entering upon and using all and every part of the lands under water adjacent to the lands of the patentee herein and to the lands hereby granted which were granted by letters patent to Nathaniel Marsh on July 18th, 1860, recorded Book 39 of Patents, page 80, and to Sarah C. Brown on May 26th, 1886, recorded Book 44 of

Patents, page 278, in as ample a manner as they might have done had said grants not been made, until the premises therein mentioned shall have been actually appropriated and applied to the purposes of commerce by erecting a dock or docks thereon or for the beneficial enjoyment of the same by the adjacent owner."

And, inasmuch as it appears that a portion of the lands under water applied for were included in a former grant made by this Board to Ann F. Cameron, dated October 8, 1866, recorded in Book 39 of Patents, page 187, I would recommend that this Board accept the surrender by this applicant without consideration of the lands under water described in said last mentioned patent, upon this applicant filing with the Secretary of State a certificate of surrender as provided for by section 75-a of the Public Lands Law duly executed and acknowledged and to be approved by the Attorney-General, before the grant now applied for be actually issued.

CHARLES D. NEWTON,
Attorney-General.

STATE OF NEW YORK,

OFFICE OF THE ATTORNEY-GENERAL,

ALBANY, *January 7th, 1921.*

BEFORE THE COMMISSIONERS OF THE LAND OFFICE

In the Matter of the Application of LOTTIE DAVIS BELL for the release of a lot of lands at Whitestone, Queens County, N. Y., which escheated upon the death of her former husband, AUGUSTUS L. DAVIS.

To the Commissioners of the Land Office:

GENTLEMEN.—The petition herein and corroborative affidavits show that the petitioner was married to Augustus L. Davis in Cincinnati, Ohio, in January, 1887, and shortly afterwards came to New York to reside; that in the year 1899 her said husband purchased a lot of land on the south side of Twentieth street, beginning 237 1-2 feet east of Eighth avenue, at Whitestone, Queens County, said lot being 30 feet front and rear and 150 feet deep, and that in 1899 her husband executed two mortgages upon said premises in which the petitioner united to secure payment of the

aggregate sum of \$1,400, which mortgages were paid and discharged by the petitioner out of her own funds after the death of her husband, Augustus L. Davis, on October 18th, 1899, intestate, and leaving no living relatives or heirs-at-law.

From the papers presented it further appears that the petitioner procured a judgment in the Supreme Court, Queens county, in an action brought by her, entitled *Bell v. Karns*, in which the unknown heirs-at-law of Augustus L. Davis were made defendants upon the report of a referee establishing that she was subrogated to the rights of said mortgages and that there was due to her, on October 20th, 1920, the sum of \$3,457.08, and decreasing the sale of said premises at public auction for the payment thereof.

The referee's report of sale in this action shows that the property was sold to the petitioner, the plaintiff in the action, for \$2,000, leaving a large deficiency, and the plaintiff desires to sell this property to one Peter Karns. The people of the State of New York were not parties to the said action of *Bell v. Karns*. She desires a release of the State's interest under the escheat in order to perfect her title.

This is a case in which the Public Lands Law provides that where a release is made to a widow it shall be without consideration, and I recommend such release.

Respectfully submitted,

CHARLES D. NEWTON,
Attorney-General.

STATE OF NEW YORK,

OFFICE OF THE ATTORNEY-GENERAL.

ALBANY, *January 11, 1921.*

BEFORE THE COMMISSIONERS OF THE LAND OFFICE

In the Matter of the Application of THE PHOENIX UNDERWEAR COMPANY of Little Falls for a quit-claim patent to certain lands within the Blue Lines of the old Western Inland Lock Navigation Company's canal in the City of Little Falls, which lands were abandoned by the Canal Board on December 20, 1881.

To the Commissioners of the Land Office:

GENTLEMEN.—The lands applied for by the Phoenix Underwear Company were formerly within the bed of the old Western Inland

Lock Navigation Company's canal incorporated by chapter 8, Laws of 1792. The said canal was completed in 1795. In 1820 the Canal Commissioners, pursuant to the provisions of section 4 of chapter 262 of the Laws of 1817, acquired all the interest and title of the Western Inland Lock Navigation Company and said canal passed into the possession of the State. Said canal lands are shown on the 1834 Canal Blue Line Map, which, by chapter 451 of the Laws of 1837, was declared to be presumptive evidence that the lands indicated thereon as belonging to the State had been taken and appropriated by the State for the canal. While Parcels A, C and D applied for, which were within the Blue Lines of said old canal, have been filled in and are more or less covered by buildings of the Phoenix Underwear Company still adverse possession of forty years has not run against the State. Lands constituting a part of the canals of the State are not, while so held, subject to adverse possession.

New York State Constitution, art. VII, sec. 8, Burbank v. Fay, 65 N. Y. 57,

and it was not until December 1881, when this portion of the canal was abandoned, that adverse possession could begin to run against the State. However, as to Parcel B the same appears to be within the bounds of old Cemetery brook and there is a question as to whether the Western Inland Lock Navigation Company ever acquired a fee title in said brook which passed to the State. It is possible that only an easement was acquired therein.

Section 30 of the Public Lands Law, as amended by chapter 299 of the Laws of 1916, excepts from the term "unappropriated State lands" abandoned canal lands the disposition of which is governed by article IV of this chapter and chapters 893 and 894 of the Laws of 1911. Article IV, referred to in section 30, is commonly called the "Walters' Act" and has reference to abandoned canal lands and structures, and by section 55 thereof, as amended by chapter 424 of the Laws of 1919, it is provided that the owner of a building located upon any lands situate in a city so abandoned for canal purposes and not sold to a city, as prescribed by section 54, shall have a preferential right to acquire the land occupied by such building with such additional contiguous lands or easements, including a right of way or means of access from the lands so occupied to or towards a public street or highway, as in the judgment of the Commissioners of the Land Office are necessary

for the beneficial use of the lands so occupied, at the appraised value thereof and the Commissioners of the Land Office shall on application and proof of occupation by such owner convey to him at the appraised value the right, title and interest of the State in such land.

I would, therefore, recommend in accordance with the statute that a grant of the lands applied for be made to the Phoenix Underwear Company at the appraised valuation thereof to be determined by the official appraisers of this Board.

Respectfully submitted,

CHARLES D. NEWTON,
Attorney-General.

STATE OF NEW YORK.

OFFICE OF THE ATTORNEY-GENERAL,

ALBANY, *February 2, 1921.*

BEFORE THE STANDING COMMITTEE ON THE HEARING OF REMONSTRANCES

In the Matter of the Application of THE BROOKLYN UNION GAS COMPANY for a grant of lands under waters of the East river in the Borough of Brooklyn, city of New York, adjoining the United States Navy Yard.

To the Commissioners of the Land Office:

GENTLEMEN — The above entitled application having been referred to your Committee, together with a remonstrance of the city of New York upon various grounds, but chiefly for the reason that the city adopted, in the year 1910, plans for a sewer system not yet acted upon which might require a part of the lands applied for for sewer outlets, we have to report that the matter came on for hearing before us on this day and the applicant and the corporation counsel of the city of New York attended before us by counsel and submitted their arguments and we are of the opinion that the remonstrance of the city of New York should be overruled and that the applicant is entitled as uplands owner to a grant of the lands applied for.

It appears that the lands applied for were wholly filled in and bulkheaded many years ago; that grants were made to the Brook-

lyn Gas Light Company and to W. F. Bulkley and others on July 8th, 1852, for purposes of commerce of portions of the lands now applied for and that there was a stone shed erected on said premises.

The applicant entered into a contract for the sale of the lands now applied for, together with adjacent uplands to the Brooklyn Edison Company, consideration to be one million dollars. The Brooklyn Edison Company on an examination of the title declined to perform the contract of purchase because of alleged defects in the title of the Brooklyn Union Gas Company, whereupon a suit was brought by the former company against the Brooklyn Edison Company to compel specific performance. The matter was brought to the attention of the Attorney-General by the Brooklyn Edison Company with the request that the Attorney-General intervene in said action on behalf of the people. The Attorney-General, however, did not do so but brought an action in June, 1920, against the Brooklyn Union Gas Company to establish the right, title and interest of the State in and to the lands in question, and upon such issue a trial was had in the Supreme Court which resulted in a judgment in favor of the applicant which was duly entered in the office of the clerk of Kings county, September 17, 1920, by which it was adjudged that the people have no right, title and interest in and to the lands applied for and that the applicant has fee title to all of the filled in lands below the original highwater line. From the judgment so entered the people took an appeal which is now pending.

For the purpose of quieting the title and to avoid the delay and expense of appeals to the Court of Appeals and the delay incident thereto the applicant offers to pay to the people of the State of New York the sum of five thousand dollars for all of its right, title and interest in and to the lands applied for. Your Committee would, therefore, recommend that a grant be made of the lands applied for in consideration of the sum of five thousand dollars, together with the expenses of appraisal and patent fees.

Respectfully submitted,

CHARLES D. NEWTON,

Attorney-General.

FRANK M. WILLIAMS,

State Engineer & Surveyor.

STATE OF NEW YORK,

OFFICE OF THE ATTORNEY-GENERAL,

ALBANY, *March 11, 1921.*

BEFORE THE COMMISSIONERS OF THE LAND OFFICE.

In the Matter of the Application of Josephine Kastulovich for the advertisement and sale at public auction as unappropriated State lands of a house and lot on Hoyt avenue, Long Island City, Queens County.

To the Commissioners of the Land Office:

GENTLEMEN — The petition herein and other affidavits show that the petitioner is the widow of Samuel Kastulovich late of the Borough of Queens, New York City, who died at the premises known as 256 Hoyt avenue, Astoria, Queens county, on June 19, 1918, leaving his last will and testament wherein he gave to his son Paul Deste, the sum of five hundred dollars or in case of said son's death to the decedent's wife, Josephine, and wherein he devised all the rest and residue of his real and personal property to decedent's wife, Josephine Kastulovich, to have and to hold the same forever and appointed her sole executrix.

This will of Samuel Kastulovich was probated before the surrogate of Queens county upon a petition by said widow where she improperly claimed herself to be a United States citizen and that the testator was a United States citizen, and also that the decedent's son, Paul Deste, was his only heir, and next-of-kin and resided in Austria. It now appears that said Samuel Kastulovich, the testator, was never a United States citizen but was a subject of Austria-Hungary; that on March 22, 1915, he declared his intention of becoming a United States citizen but never completed his citizenship; that said Samuel left him surviving, in addition to his widow, Josephine, his illegitimate son, Paul Deste, and his brother, Joseph Kastulovich, which Joseph is a United States citizen and who has executed a conveyance of all his right, title and interest in and to the said escheated premises to the petitioner herein.

The said Samuel Kastulovich acquired title to said premises under and pursuant to the last will and testament of Carl Ernst of the Borough of Queens who died at Long Island City on Jan. 5, 1918, seized of said premises, which will of said Carl Ernst was probated by the surrogate of Queens county on September 30,

1918, and a judicial settlement of the accounts of the executor under said will was had before the surrogate of Queens county on July 5, 1919. On the probate of the will of Carl Ernst the petition of the executor showed that the decedent was a United States citizen, had a widow, Wilhelmina Ernst, and two daughters, Anna and Louise Ernst, all of whose residences were unknown, and that the petitioner was unable to ascertain their places of residence or whether they were living or dead. There was submitted to the Surrogate the affidavit of the executor showing that in the year 1890 when Carl Ernst deposited money in the German Savings Bank of New York City he said he was born in Hamburg, Germany, and was a widower, that his deceased wife's name was Wilhelmina and that he had two children, namely, Anna and Louise, but after a great effort no information could be procured as to the whereabouts of said daughters.

It appears that Carl Ernst, being the owner of the premises 256 Hoyt avenue, Astoria, rented the same to Samuel Kastulovich and wife and boarded with them for five years next preceding his death; that Carl Ernst stated to the petitioner, Josephine Kastulovich, that he was born somewhere in Germany and came to the United States when he was forty years of age and lived here for over forty years. He talked very little about his family affairs except that on several occasions he told the petitioner he had no wife, child or children or other living relatives and used the expression "I have no one in the world to go to in my old days," and that during all the time of his residence with the petitioner he had no visitors or received any letters or visited any one to her knowledge. The said daughters were, therefore, served with a citation for the probate of the will of Carl Ernst by publication pursuant to an order of the surrogate of Queens county.

There has also been submitted a certified copy from the clerk of the city of New York of a marriage contract made between Simeone Krstulovic, age 33 years, residing 258 Hoyt avenue, Astoria, L. I., and Josefina Bassar, age 23 years, arrived at Ellis Island per Steamship Carpathia on April 18, 1906, whereby they agreed to marry and take each other as husband and wife and assume the marriage obligations thereto pertaining. This contract was executed in duplicate at Ellis Island on April 18, 1906.

On March 27, 1918, said Samuel Kastulovich borrowed money from one Mary Castellan, and as security for the repayment of said loan executed and delivered to her an assignment of a part of his

interest in and to the estate so devised to him by the will of Carl Ernst, and after the death of said Samuel Kastulovich the petitioner executed a bond and mortgage for four hundred and fifty dollars to said Mary Castellan to secure said loan covering the said premises.

The petitioner has expended about three hundred dollars for repairs to the one-story frame dwelling house on said property, and, aside from a small amount of rents from a family consisting of Anthony Arimini and wife occupying said one-story frame dwelling, she has no income or other means of support. She, therefore, asks that the interest of the State of New York may be advertised and sold at public auction.

The value of said premises is about two thousand dollars and petitioner seeks to acquire any possible interest that the State may have by escheat in order to clear any defects in the title to said premises due to the possibility of heirs of Carl Ernst, and also on account of the fact that her husband may have failed to take out his second papers as a United States citizen before his death.

The application by the petitioner under section 60 of the Public Lands Law for the release to her as the surviving widow of Samuel Kastulovich of the State's interest in said premises was filed with your Honorable Board November 21, 1919, and after compelling the petitioner to present and file voluminous proofs, I communicated with her attorney and stated that there was some question as to whether under the provisions of the Public Lands Law, the Commissioners of the Land Office have power under the possible double escheat on deaths of Carl Ernst and Samuel Kastulovich to grant the State's interest without consideration to the petitioner and advised him to withdraw that application (which he has done) and file this present application under section 30 to 35 of the Public Lands Law for advertisement and sale of the State's possible interest. She, therefore, asks the Board to fix a low upset price at which the lands shall be offered for sale by the State Engineer and Surveyor, and that the sale be held in the city of Albany.

Affidavits have been presented by reputable United States citizens that the said Josephine Kastulovich, the petitioner, and her husband, Samuel, were during the late war loyal to the United States government.

Respectfully submitted,

CHARLES D. NEWTON,

Attorney-General.

STATE OF NEW YORK,
OFFICE OF THE ATTORNEY-GENERAL,

ALBANY, May 4, 1921.

BEFORE THE STANDING COMMITTEE ON THE HEARING OF REMONSTRANCES OF THE COMMISSIONERS OF THE LAND OFFICE.

In the Matter of the Application of the Morse Dry Dock and Repair Company for a grant of land under the waters of the Narrows, New York Bay, in Richmond County.

To the Commissioners of the Land Office:

GENTLEMEN.—This matter having been referred to your Committee, and the hearing having been held this 4th day of May, 1921, your Committee would recommend to your Honorable Board that a grant be made for beneficial enjoyment to the applicant, that the appraised valuation and in lieu of the additional reservation recommended by the Attorney-General in his report of May 15, 1921, that the following provision be inserted in patent to issue: "This grant is made without prejudice to any rights of the State in Parcel B as shown in the State Engineer and Surveyor's map accompanying the application here and which Parcel B forms no part of the lands applied for." The Attorney-General having approved as to form and manner of execution a certificate of surrender of a former grant made to Anne F. Cameron dated October 3, 1866, it is further recommended that such certificate of surrender be accepted.

Respectfully submitted,

CHARLES D. NEWTON,
Attorney-General.

N. M. MARSHALL,
State Treasurer.

FRANK M. WILLIAMS,
State Engineer and Surveyor.

STATE OF NEW YORK,
OFFICE OF THE ATTORNEY-GENERAL,

ALBANY, *May 4, 1921.*

BEFORE THE STANDING COMMITTEE ON THE HEARING OF REMONSTRANCES OF THE COMMISSIONERS OF THE LAND OFFICE.

In the Matter of the Application of South Atlantic Realty Company for a grant of land under water, New York Bay, Richmond County.

To the Commissioners of the Land Office:

GENTLEMEN.—This matter having been referred to your Committee, we have the honor to report that the matter came on for hearing before your Committee this 4th day of May, and your Board having taken into consideration the fact that the applicant has succeeded to the title granted to various patentees under both commerce and beneficial enjoyment grants and already having substantial equities in the lands now applied for, they recommend that a grant be made by your Honorable Board to the applicant for the sum of \$30,000.

Respectfully submitted,

CHARLES D. NEWTON,
Attorney-General.
N. M. MARSHALL,
State Treasurer.
FRANK M. WILLIAMS,
State Engineer and Surveyor.

STATE OF NEW YORK,
OFFICE OF THE ATTORNEY-GENERAL,

ALBANY, *May 4, 1921.*

BEFORE THE STANDING COMMITTEE ON THE HEARING OF REMONSTRANCES OF THE COMMISSIONERS OF THE LAND OFFICE.

In the Matter of the Application of the Tonawanda Iron & Steel Company for a grant of land under the waters of the Niagara River.

To the Honorable, the Commissioners of the Land Office:

GENTLEMEN.—This matter coming on to be heard before your Committee, at Buffalo, on Thursday, April 28th, 1921, and also

at an adjourned meeting held at Albany on May 4th, 1921, at which counsel for the applicant was present and submitted a surrender of a former grant for the purposes of commerce, which was made on March 7th, 1893, to Sherman S. Jewett and others, for a tract of land containing 11.4 acres, being the greater part of the lands now applied for and which lands so granted were filled in and improved in accordance with the conditions of said grant, which has been approved by the Attorney-General as to form and manner of execution of said surrender, the said patentees, Jewett and others, being the grantors to the Tonawanda Iron and Steel Company, under a deed dated March 6th, 1894, recorded in Liber 214 of Deeds, page 380, Erie county, which said commerce grant did not contain any recapture clause in favor of the State, and which surrender should be accepted by your Board.

Therefore, on account of the peculiar circumstances connected with this case, it is considered by your Committee that a grant should be made, as now applied for, to the Tonawanda Iron and Steel Company, at the price of \$1,000 per acre for the entire acreage applied for, making a total of \$11,423, the grant herein to contain the following recapture clause, in lieu of the usual recapture clause in favor of the State as follows:

“Second. Upon the express condition that if the State of New York shall at any time hereafter acquire said premises and ‘improvements,’ or a part or portion thereof, by appropriation or otherwise, the liability of the State shall be limited to the amount paid by said ‘patentee’ to the State, for this patent, or a proportionate part thereof, together with the expenses necessarily incurred by the ‘patentee’ for the acquiring of this patent which are hereby fixed at the sum of \$350, and, also, the value of the ‘improvements’ on said premises, or the proportionate part thereof which may be so acquired. The value of such ‘improvements’ if all are so acquired, or such proportionate part of the amount paid by said ‘patentee’ for this patent, and of the value of such ‘improvements’ on a portion of such lands which may be so acquired by the State, and all damages, if any, to the upland of the owner, and the improvements thereon to which the owner is lawfully entitled, to be paid by the State of New York, shall be determined in accordance with law.”

This patent shall also contain the following provisions:

“This grant is subject to the rights heretofore conveyed by the patentee to the City of Lockport by two certain deeds

made and executed by the patentee to the City of Lockport, one dated the 1st day of July, 1918, and recorded in the office of the Clerk of the County of Niagara, State of New York, in Liber 394 of Deeds at page 8 on the 7th day of March, 1919, and the other dated the 1st day of July, 1918, and recorded in the office of the Clerk of the County of Niagara, State of New York, in Liber 415 of Deeds at page 438 on the 7th day of March, 1919."

Respectfully submitted,

CHARLES D. NEWTON,
Attorney-General.

N. M. MARSHALL,
State Treasurer.

FRANK M. WILLIAMS,
State Engineer and Surveyor.

STATE OF NEW YORK,
OFFICE OF THE ATTORNEY-GENERAL,

ALBANY, June 9, 1921.

BEFORE THE COMMISSIONERS OF THE LAND OFFICE.

In the Matter of the Application of Samuel Tumposky, mortgagee under purchase money mortgage, for a determination under section 1627 of the Code of Civil Procedure.

To the Commissioners of the Land Office:

GENTLEMEN — The amended petition herein states that the petitioner, Samuel Tumposky, is the holder of a purchase-money mortgage dated April 24, 1919, made by Abraham Bloom and wife for \$3,300 and interest, and that there is due thereon \$2,850 with interest at six per cent from November 1, 1920. Said mortgage covers a track of land 60 feet by 100 feet in the city of Utica and was recorded in Oneida county clerk's office April 24, 1919 in Book 557 of Mortgages at page 128. The petition further shows that on January 7, 1919, there were docketed two judgments, recovered in the Supreme Court of Oneida county

by the people of the State of New York against said Abraham Bloom for violation of section 110 of the Agricultural Law, one for \$136.99 and the other for \$79.87, which judgments are liens on said premises subsequent to said mortgage and also subsequent to two other prior mortgages held by the Savings Bank of Utica, N. Y., upon which is due \$1,880 with interest from May 1, 1921, and said judgments are also subsequent to another judgment for \$91.93, recovered in the Supreme Court of Oneida county by Frank D. Crim against said Abraham Bloom, docketed in said county clerk's office August 3, 1917. The petition further shows that the city and county taxes on said premises, amounting to \$178.40, have not been paid and that the legal title to said premises is still in said Abraham Bloom.

I would, therefore, pursuant to section 1627 of the Code of Civil Procedure, recommend to your Honorable Board that it determine that it is not for the best interest of the State that the Treasurer pay off the mortgage held by Samuel Tumposky.

Respectfully submitted,

CHARLES D. NEWTON,

Attorney-General.

STATE OF NEW YORK,

OFFICE OF THE ATTORNEY-GENERAL,

ALBANY, June 9, 1921.

BEFORE THE STANDING COMMITTEE ON THE HEARING OF
REMONSTRANCES OF THE COMMISSIONERS OF THE
LAND OFFICE.

In the Matter of the Application of LUCKENBACH TERMINAL Co.,
INC. for a grant of land under water in the Hempstead harbor,
in the Town of North Hempstead, Nassau county.

To the Commissioners of the Land Office:

This is an application by the Luckenbach Terminal Company, Inc., the fee owner of a tract of land in the town of North Hempstead, Nassau county, for a grant of land under water extending out from said uplands a distance of five hundred feet into the waters of Hempstead harbor. Remonstrances to said application were filed by Mary E. C. Smith and Martha W. M. Fraser, up-

land owners adjoining the lands of this applicant, and also by the town of North Hempstead. The first two remonstrants have since stipulated that their respective remonstrances be withdrawn upon condition that any patent for the lands under water herein applied for should contain a condition that there shall not be erected upon that portion of the land granted which lies between high and low-water mark any solid structure which will prevent the full and natural wash of the sands along the beach. The remonstrance on the part of the town of North Hempstead is made upon the ground that the title to the lands under water applied for is not in the State but in the town.

Briefs have been filed by counsel for the town and also by the applicants on the question of the title to the lands under water in Hempstead harbor, and it is the opinion of your committee that the remonstrance of the town of North Hempstead should be overruled. Several previous grants have been made by your Honorable Board of lands under water in Hempstead harbor, and it is the belief of your Committee that the State, and not the town, is the owner of the lands under water applied for.

We, therefore, recommend that letters patent, after an appraisal, issue to the Luckenbach Terminal Company, Inc. to the lands under water applied for, subject to a condition that there shall not be erected upon that portion of the lands so granted which lies between high and low-water mark any solid structure that will prevent the full and natural wash of the sands along the beach.

CHARLES D. NEWTON,
Attorney-General.

N. M. MARSHALL,
State Treasurer.

FRANK M. WILLIAMS,
State Engineer and Surveyor.

STATE OF NEW YORK,

OFFICE OF THE ATTORNEY-GENERAL,

ALBANY, June 30, 1921.

To the Commissioners of the Land Office:

GENTLEMEN — Referring to a complaint by the department of health of the city of New York relative to an alleged nuisance

caused by an accumulation of stagnant water on lot 52, section 18, block 6075, at the corner of Durussey street and 86th street in the Borough of Brooklyn, which was referred to me by your Honorable Board with power to act, at a meeting of the Commissioners of the Land Office held April 6, 1921, and in which complaint it is stated that the nuisance consists of an accumulation of stagnant water on the surface of said lot which is 20 feet below the grade of the street, and recommends that some means be taken to prevent at all times the breeding of mosquitoes in or on such place, I have to say that the State Comptroller reports that the land referred to is Lot 484-a, map 4, Fort Hamilton village, Kings county, title to which was acquired by the State through the Comptroller's tax sales of 1881, 1890 and 1895.

I have to report that I am unaware of any appropriation made by the Legislature for the expenditure of money for the purpose of physically abating this alleged nuisance. These lands being tax lands could be sold by your Honorable Board at public auction, after due advertisement, as unappropriated State Lands and upon such sale the city of New York or any person interested could purchase the same and abate the nuisance.

Respectfully submitted,

CHARLES D. NEWTON,
Attorney-General.

STATE OF NEW YORK,
OFFICE OF THE ATTORNEY-GENERAL,

ALBANY, August 3, 1921.

To the Commissioners of the Land Office:

GENTLEMEN.—Reporting upon the proposed sale by your Honorable Board, pursuant to chapter 665 of the Laws of 1921, which authorizes and empowers the Commissioners of the Land Office to sell at public or private sale in their discretion, and convey to the purchaser or purchasers thereof upon such compensation as said Commissioners may determine, all the right, title and interest of the State in and to a certain tract of land situated in the city of Utica, Oneida county, which was sold and conveyed to the people of the State of New York by Charles A. Mann and wife, by deed dated May 5, 1859, and recorded in Oneida county clerk's office in Book 214 of Deeds, page 441, on the north side of the New York

Central Railroad Company's tracks to the center of the Mohawk river, as described in said deed, and containing forty-five and one-half (45 1-2) acres of land, exclusive of the Mohawk river, excepting therefrom a certain parcel of land containing three and forty-seven one-hundredths (3.47) of an acre which was sold to the C. A. Durr Packing Company, Inc., by the people of the State of New York by deed dated October 3, 1919, and said Commissioners were further authorized to sell and convey in like manner all the right, title and interest of the State in and to an easement for a right of way across the northerly portion of the land so conveyed to the C. A. Durr Packing Company, Inc., from the west line of Schuyler street to the adjoining lands owned by the State, reserving, however, to the people of the State an easement for a right of way thirty (30) feet in width over the lands authorized to be sold and conveyed for the maintenance of a sewer from the Utica State Hospital into the Mohawk river as the same is now constructed and in use, would say that as the evident purpose of this legislative provision is to provide funds for the purchase by the State Hospital Commission of certain other lands in the town of Marcy, Oneida county, for the use of the Utica State Hospital, and a communication having been received from the State Hospital Commission wherein they recommend that the land first above described be sold at public auction at not less than sixteen thousand dollars (\$16,000), this being the amount provided by section 3 of said Act at which said lands should be sold in order that funds for the purchase of land in the town of Marcy for the use of the Utica State Hospital should be available, I do hereby recommend that the lands above described in the city of Utica be advertised and sold under the direction of the State Engineer and Surveyor, pursuant to law and the regulations of this Board at not less than sixteen thousand dollars (\$16,000) and the expenses of the sale, the terms of sale to require the purchaser to pay the full purchase price at time of sale, and notice of sale to be published in a public newspaper published in the city of Utica, and the purchaser to receive a quit-claim patent upon production of the Treasurer's receipt in full of payment and the certificate of sale of the State Engineer and Surveyor for such land.

Respectfully submitted,

CHARLES D. NEWTON,
Attorney-General.

STATE OF NEW YORK,

OFFICE OF THE ATTORNEY-GENERAL,

ALBANY, *December 7, 1921.*

BEFORE THE STANDING COMMITTEE ON THE HEARING OF REMONSTRANCES OF THE COMMISSIONERS OF THE LAND OFFICE

In the Matter of the Application of the City of Cortland and the County of Cortland for the transfer to them of the old site of the State Normal and Training School in the City of Cortland, pursuant to chapter 106 of the Laws of 1921, amending chapter 611 of the Laws of 1920.

To the Commissioners of the Land Office:

GENTLEMEN.—Pursuant to chapter 106 of the Laws of 1921, amending chapter 611 of the Laws of 1920, application has been made by the city of Cortland and the county of Cortland for a release to them by your Honorable Board of the whole of the old site of the State Normal and Training School in Cortland.

By mutual agreement between the city and county the said site is to be divided between the village and county so that the county may acquire land for the purpose of erecting a new court house and jail, the present jail having been condemned by the State Prison Department. The city of Cortland desires to maintain the balance of said site as a public park. The portion to be taken by the county embraces all of the land lying easterly of the east line of the Methodist Church lot fronting on Church street, and running through to Greenbush street, bounded by the northern line of the south sidewalk north of the old Normal School building, together with a right of way from the northwest corner of said tract 12 feet wide to Church street, and the city takes the balance of the site.

The parcel of land to be conveyed to the county is a rectangle, the north and south lines of which are 439-56/100 feet, the east line 173-65/100 and the west line 180-53/100 feet. On the easterly side of this tract is a parcel of land which was purchased by the State from Sarah A. Townsend and Sally A. Hotchkiss on July 26th, 1879, for which the State paid a consideration of \$3,250. In the southwestern part of the portion of the premises to be conveyed to the city is a small lot fronting 30 feet on Church street, the same in rear and 132 feet on each side, which was purchased from the Methodist Church on July 21st, 1896, by the State for the consideration of \$1,500.

The residue of the site had been previously acquired by the State without consideration from the village of Cortland on November 5th, 1868, and from the trustees of Cortlandville Academy on October 18th, 1869.

Attention should be called to the provisions of the conveyance to the State by the trustees of the Cortlandville Academy, dated October 18th, 1869. This deed recites an act of the Legislature, passed April 16th, 1868, whereby said trustees were authorized to convey the land therein described for the use of a normal school building on such terms as said trustees might by resolution provide; that by resolution of the board of trustees of said academy, adopted October 18th, 1869, the conveyance of the use of said land was directed subject to the following conditions

“First. An academic department shall be maintained and supplied with proper teachers in said normal school building by the proper State authority.

Second. Tuition shall be given free and without charge to all the children and wards of the inhabitants residing within the bounds of a corporation of Cortland village in all the departments of said school.

Third. The land, the use of which is hereby conveyed, to be used as a part of said site and that on the breach of either of said conditions, the conveyance should be void and said land and the use and the possession thereof should revert to the said trustees or to their successors or their legal representatives.”

This deed was accordingly executed subject to such conditions. The city of Cortland has succeeded to all of the rights of the trustees of the Cortlandville Academy.

A protest by Israel T. Deyo, Esq., a member of the local board of the State Normal School at Cortland, has been made, which has been concurred in by William H. Clark, chairman of said board. Mr. Deyo and Mr. Clark call attention to the condition in said conveyance requiring the maintenance of an academic department in said Normal School, and that under the present normal school system there is no occasion or excuse for the maintenance of such an academic department at the expense of the State, but there is the same need of children to furnish practice material for teachers in training, and suggesting that upon the reconveyance of this land by the State the city shall abandon its claim to the maintenance by the State of an academic department in the new normal school

which is to be located on a different site in the city of Cortland. The old site of the normal school sought to be acquired by the city and county is valuable.

A hearing was held on this application before your Committee on November 30th, 1921, attended by the city and county attorneys of Cortland, by Hon. Frank B. Gilbert for the Commissioners of Education and for the board of managers of the State Normal School, and by John F. Tremain, Secretary of the State Commission of Prisons.

We would, therefore, recommend that a grant be made to the county of Cortland of the parcel of land forming the southerly portion of the site as above described, together with an easement of a strip 12 feet wide to Church street, subject to the condition and restriction that no building be erected by the county of Cortland thereon within 20 feet of the northern line thereof, using the description given in the said petition and that a grant of the remaining lands subject to said right of way to the county of Cortland be conveyed to the city of Cortland by the description of lands in said petition requested to be conveyed to said city, such grants to be made upon such terms and conditions and upon such consideration to be paid to the State as may, to your Honorable Board, seem just and proper, the said grants to be made upon condition that the State be released from any responsibility to maintain an academic department for the instruction of pupils of the city of Cortland, and that such grants be made subject to the approval of the Attorney-General as to form.

The statute directs:

“No such grant shall be made, however, until there shall be filed in the office of the Commissioners of the Land Office the certificate of the State Commissioner of Education to the effect that the lands proposed to be conveyed are no longer required by the State for Normal School purposes.”

We hereby certify that such certificate of the State Commissioner of Education has been filed accordingly.

Respectfully submitted,

CHARLES D. NEWTON,
Attorney-General.

N. M. MARSHALL,
State Treasurer.

FRANK M. WILLIAMS,
State Engineer and Surveyor.

GENERAL INDEX

	PAGE
Actions against State Officials.....	27
Agricultural Affairs, report on.....	17
Appellate Courts, proceedings in.....	18
Appellate Division, First Department, proceedings pending.....	20
Appellate Division, Second Department, proceedings pending.....	20
Appellate Division, Third Department, proceedings pending.....	21
Appellate Division, Fourth Department, proceedings pending.....	25
Applications to Attorney-General to commence actions in name of people.....	56
opinions in such applications.....	441
Bonus for Soldiers, constitutionality of law.....	5
Co-Operative Society of America, investigation of.....	7
Conservation Law, actions under.....	55
Court of Appeals, proceedings pending.....	19
Court of Claims Bureau.....	16
Excise Bureau.....	13
Gas Rate Cases.....	5
Knight Act, constitutionality of.....	8
Land Bureau, work of.....	11
Law Breakers, campaign against.....	7
Maritime Workers, application of Workmen's Compensation Law.....	6
Memoranda.....	419
Miscellaneous Actions and Proceedings.....	35
New York City Bureau, work of.....	8
Opinions, formal.....	61-225
Opinions, informal.....	227-438
Quo Warranto proceedings.....	56
opinions in.....	441-469
Railroad Rate Cases.....	5
State Hospital Bureau, work of.....	9
Summary.....	14
Title Bureau, work of.....	10
United States Supreme Court, proceedings pending.....	18
War Contracts, constitutionality of Knight Act.....	8
Workmen's Compensation Law.....	6, 12

INDEX TO OPINIONS, FORMAL AND INFORMAL.

ADJUTANT-GENERAL:	PAGE
chapter 122, Laws 1919; persons entitled to World War Medals....	247
section 19-a, Military Law; retirement of Civil War Veterans.....	260
ADOPTION OF CHILDREN:	
right of special County Judge or special Surrogate to grant order..	352
ADVERTISING MATTER:	
section 1142-a, Penal Law; distribution to medical profession by chemists.	382
ALIENS:	
section 10, Real Property Law; alien residents of state may purchase and hold property.	402
securities held by State Insurance Department.....	417
APPLICATIONS FOR LEAVE TO COMMENCE ACTIONS IN NAME OF PEOPLE AND OPINIONS THEREIN:	
application of Amelia Salomon to proceed against universal Electric Welding Company.	441
application of Lou. B. Cleveland to dissolve the Syracuse and Suburban Rail road Company.	450
application of Emanuel Zimmet et al., to dissolve The Electric Trading Company.	452
application to commence quo warranto proceeding, Nicholas A. DeJohn against Frederick E. Lytle, title to office of Village Trustee.	453
application of William L. Howland to dissolve Century Manufacturing Corporation.	458
application of David Deuer to dissolve National Grain Company... ..	460
application of Robert Walker to bring quo warranto proceedings against Reginald W. Preasprich to test title to office of Village Trustee.	462
application to remove from office the president of O. L. Forrester Agency, Inc.....	465
application to dissolve Kinney Manufacturing Company.....	468
APPOINTMENTS:	
from suspended lists.	149
authorization by Board of Supervisors.....	70
probationary.	64
ARCHITECTS:	
article 7-a, General Business Law; right to practice without certificate from Board of Regents.....	252
section 77, General Business Law; use of word "architect".....	295
ARMISTICE DAY:	
section 24, General Construction Law, legal holiday.....	377
section 145, Negotiable Instruments Law; negotiable instruments payable on Armistice Day.....	378
ARSENAL:	
sale of; payment of broker's fee not authorized.....	247

BANKING LAW:

	PAGE
bonds of City of Covington, Kentucky, as legal investments for savings banks.	285
Industrial Banking System, Incorporated.	291
savings banks automatic tellers.	294
sections 33-a, 33-b, 501, 186, 223, right of foreign trust companies to do business in New York State.	229
section 239; railroad bonds as savings banks investments.	254
section 245; restricting places of business of savings banks.	294
section 239; tax anticipation bonds of state of Arizona as legal investments for savings banks.	288
section 238, subdivision 3; common school warrants of state of Georgia are not legal investments for savings banks in New York State.	280
section 230; notice of intention to form savings banks corporation.	286
section 239, subdivision 3; bonds of North Dakota as legal investments for savings banks.	301
section 239; bonds of cities of state of Missouri as investments.	271
section 239, notes issued by military college in South Carolina as investments for savings banks.	302
section 239; bonds of cities of West Virginia as investment for savings banks.	273
section 293; domestic business corporations negotiating securities.	304
section 293; Empire State Finance Corporation must comply with provisions of banking law as to investment companies.	307
section 267; buying of mortgage by savings banks from trustee.	370
section 145, Negotiable Instruments Law; negotiable instruments payable on Armistice Day.	378

BARGE CANAL:

Canadian canal boats or tugs may not carry cargo from one point to another on State Barge Canal.	264
--	-----

BIDS:

may not exceed amount appropriated.	401
---	-----

BOARD OF DIRECTORS:

section 230, Banking Law; notice of intention to form savings banks corporation.	286
--	-----

BOARD OF EDUCATION:

salaries of laborers.	61
-------------------------------	----

BONDS:

of school collector.	348
section 239, Banking Law; railroad bonds as savings banks investments.	254
section 239, Banking Law; bonds of North Dakota as legal investments for savings banks.	301
section 239, Banking Law; notes issued by military college in South Carolina as investments for savings banks.	302
section 239, Banking Law; domestic corporations negotiating securities.	304
section 239, Banking Law; bonds of the cities of state of Missouri as investments for savings banks.	271
section 239, Banking Law; legality of bonds of cities of West Virginia as investments for savings banks.	273
section 100, Insurance Law; bonds of Great Northern and of The Northern Pacific Railway Companies as investments.	284
section 239, Banking Law; tax anticipation bonds of state of Arizona as legal investments for savings banks.	288

BONDS — Continued.

PAGE

article VII, State Constitution; all bonds issued by State Comptroller subsequent to January 1, 1921, must be serial bonds.....	276
bonds of city of Covington, Kentucky, as legal investments for savings banks.	285
limitation on water bonds.....	392
municipal authorities have power to pay brokerage fees for sale of bonds.	261
payment of premium on bond of school collector.....	348
power of village authorities to change date of issue of maturity of village bonds.	279
school authorities have no power to issue bonds bearing greater rate of interest than specified in proposition voted upon.	275

BONUS LAW:

constitutionalality of.	431
---------------------------------	-----

BOXING LAW:

section 25; tax upon proceeds of exhibitions for praise-worthy cause.	229
section 3; license required for training exhibitions in gymnasiums.	250
state will not sue upon boxing club bond to recover debt due boxer.	381

BRIDGES:

application of insurance moneys paid for Troy-Cohoes Bridge.....	357
maintenance of bridge, Cayuga Lake Inlet, Ithaca.....	341
voting on proposition to raise funds for building.....	339

BROKER'S FEE:

not authorized for sale of Arsenal property.....	247
municipal authorities may pay.	261

BUSINESS CORPORATION LAW:

section 2, domestic business corporations negotiating securities.....	304
section 2, Empire State Finance Corporation must comply with provisions of banking law as to investment companies.	307

CALVES:

section 90, Village Law; ordinance regulating keeping within village limits.	270
--	-----

CANAL BRIDGES:

maintenance of, over Cayuga Lake Inlet.....	341
---	-----

CANAL LANDS:

disposition of.	75
superintendent of public works has power to issue revocable permits for use of canal lands.	273

CHANGE IN CORPORATE NAME:

section 7, General Corporation Law.....	237
---	-----

CHARTERS:

amendment of special corporate charters without legislative action..	232
Chautauqua Institution.	86
city of Dunkirk; right to condemn private property for water supply purposes.	349
section 270, charter of city of Jamestown; majority vote is final....	290

CHAUFFEURS:

disposition of fees.	121
section 281, General Highway Law; veterans not required to secure chauffeur's license when operating motor car while learning vocational trade.	244

CHAUFFEURS — Continued.	PAGE
section 281, General Highway Law; volunteer drivers of motor fire apparatus need not be licensed as chauffeurs.	296
CHAUTAUQUA INSTITUTION:	
insurance under Workmen's Compensation Law.	86
CHILD WELFARE LAW:	
jurisdiction of Suffolk County Board of Child Welfare.	365
CHURCH PROPERTY:	
exemption from taxation.	256
CIVIL SERVICE LAW:	
section 21-b; preference to veterans.	158
section 22-a; suspended lists.	149
section 22-a; reinstatements.	149
section 22-a; transfers.	149
section 22-a; promotions.	149
sections 22-a; appointments.	149
sections 9, 22; probationary appointments.	64
retention of veterans.	64
section 21-a; computing pension.	299
section 21-b; preference to veterans.	367
section 21-a; retirement of civil war veterans.	398
CODE OF CIVIL PROCEDURE:	
section 3311; payment of stenographer's fees.	180
section 773; duties of coroners.	312
section 56, Justice of Peace has no jurisdiction to try person over sixteen years of age for violation of section 1897, Penal Law. . . .	245
COMMISSIONER OF CHARITIES, ERIE COUNTY:	
appointment of subordinates.	70
COMMISSIONER OF LAND OFFICE, APPLICATION TO AND OPINIONS:	
application of Morse Dry Dock and Repair Company for grant of land under water.	473
application of Lottie Davis Bell for release of escheated lands of Augustus L. Davis.	474
application of The Phoenix Underwear Company for patent to lands within canal blue lines.	475
application of The Brooklyn Union Gas Company for land under water.	477
application of Josephine Kastulovich for sale of unappropriated state lands.	479
application of Morse Dry Dock and Repair Company for land under water.	482
application of South Atlantic Realty Company for land under water.	483
application of Tonawanda Iron & Steel Company for land under water.	483
application of Samuel Tumposky, mortgagee under purchase money mortgage, for a determination under section 1627 of Code of Civil Procedure.	486
application of Luckenbach Terminal Co. for land under water. . . .	486
application of Department of Health of the city of New York relative to abatement of nuisance caused by stagnant water.	488
application relative to sale of land in the city of Utica, funds to be used for purchase of land for use of Utica State Hospital.	488
application of city of Cortland for transfer of school site.	490

COMMITMENTS:

residences of committed party.....	297
section 5, Judicial Law; commitment of insane on Sunday.....	292
section 85, Insanity Law; costs of commitment.....	384

COMPENSATION:

section 570, 571, Education Law; school physician.....	333
--	-----

CONDEMNATION PROCEEDINGS:

right to condemn private property for water supply purposes.....	349
--	-----

CONSERVATION COMMISSION:

authority of Commissioner to execute agreement for cutting timber on state land.....	103
condemnation of private property for water supply purposes.....	349
construction of highways within forest preserve.....	130
control and disposition of land appropriated for canal within forest preserve.....	75
cutting timber on state land and reforestation.....	103
dams, reconstruction of.....	124
hunting and fishing on Indian Reservations.....	83
powers of, to grant permits forest preserve.....	124
powers of, highway construction.....	130
refunding fines for violation of Conservation Law.....	183
regulation of tree cutting on privately owned lands.....	110
section 188, Conservation Law; non-resident fishing licenses.....	219
section 16, 17, Tax Law; tax exemption of reforested land.....	328
spoil banks.....	130
tree cutting for use in restoring dams.....	124

CONSERVATION LAW:

powers of Conservation Commission.....	130
section 188; non-resident fishing licenses.....	219
section 29; refunding fines.....	183
section 59; permits within forest preserve.....	124

CONSTITUTIONAL LAW:

construction of highways within forest preserve.....	130
--	-----

CONTRACTS:

section 6, Domestic Relations Law; marriage contracts.....	257
--	-----

CORONERS:

section 378, Public Health Law; duties.....	312
---	-----

CORPORATIONS:

officers not entitled to vote at town meeting on proposition to raise money by Tax Law.....	364
section 15, Stock Corporation Law; use of more than one name in case of merger.....	366
section 221, General Corporation Law; publication of certificate of dissolution of corporation.....	335

CORPORATION TAX:

section 219-h Tax Law; method of distribution of corporation tax..	356
--	-----

COUNSEL FEES:

payment from village funds when employed to contest before Public Service Commission.....	249
---	-----

COUNTY CLERK:

PAGE

authority as to issuing transcripts of records.....	187
county clerk's office not required to be opened on Armistice Day....	377
section 162, County Law; designation of deputy county clerk.....	396

COUNTY LAW:

subdivision 5, section 12; right of Board of Supervisors to authorize appointment of additional deputy sheriff, Oneida County.....	239
supervisor may not hold office of deputy county clerk.....	396
section 249; court and trust funds, investment of.....	215
section 12; Board of Supervisors of Erie county may appropriate for hospital.	306
section 161-a; peddler's license to veterans.....	368
section 162, duties of deputy and special deputy county clerk.....	396
section 181, eligibility of under sheriff for election to office of sheriff.	388
section 43, power of Board of Supervisors to establish laboratory...	375

COURT AND TRUST FUNDS:

investment of funds deposited with County Treasurer.....	215
loss through depreciation in value of Liberty bonds.....	215
transfer of securities.....	215

CREDIT CLEARING HOUSE:

guaranty of credit.	235
-----------------------------	-----

CREDIT GUARANTEES:

section 170, Insurance Law; credit clearing house guaranty of credit.	235
---	-----

CRIMINAL CODE:

section 56; jurisdiction of Justice of Peace.....	245
---	-----

DEBTS:

state will not sue upon boxing club bond to recover debt due boxer.	381
---	-----

DELEGATION OF AUTHORITY..... 165

DISSOLUTION:

section 221, General Corporation Law; publication of certificate of voluntary dissolution.	335
--	-----

DOMESTIC RELATIONS LAW:

section 19; regulations relative to issuing transcripts of records...	186
sections 11, 12, 225; non-resident clergymen solemnizing marriage within this state.	259
section 6; marriage contracts.	257
section 113; power of special county judge or special surrogate to grant order of adoption.	352

DUMPING GROUNDS. 282

DUNKIRK; CITY OF:

right to condemn private property for water supply purposes.....	349
--	-----

EDUCATION LAW:

school authorities have no power to issue bonds bearing greater rate of interest than specified in proposition voted upon.....	275
section 570; employment of medical inspectors.....	333
section 887; application of Labor Law to salaries of laborers for Board of Education.	61

EDUCATION LAW — Continued.	PAGE
section 1106; deputy state treasurer may sign checks for disbursements from State Teacher's Retirement Fund.	234
public library trustee may hold village office.	278
ELECTION:	
town superintendent of highways for funds for building bridges. . .	339
ELECTION LAW:	
article 12, State Constitution; phraseology of legislative bill.	263
ELIGIBILITY FOR OFFICE:	
article III, section 7; state constitution, member of state legislature need not resign in order to be candidate for elective city office. . .	327
EMINENT DOMAIN:	
power of city to condemn private property for water supply purposes. .	349
EXECUTIVE LAW:	
section 52; right of deputy state treasurer to sign checks for disbursements from State Teacher's Retirement Fund.	234
EXEMPTION OF REALTY FROM TAX:	
new buildings exempt from local taxation.	355
FEES:	
broker's fee for sale of State Arsenal not authorized.	247
disposition of fees collected for chauffeurs and operator's licenses, motor vehicle law.	121
disposition of fees for registration of motor vehicles.	121
for licensing motion picture films.	321
municipal authorities have power to pay brokerage fees for sale of bonds.	261
payment to stenographers of state tax commission for minutes of hearing.	180
section 282; Secretary of State should not register motor vehicle to sealer of weights and measures unless said vehicles are controlled by municipality.	271
section 25, Public Health Law; laboratory not entitled to fee for reports.	337
section 25, Public Health Law; allowed health officer for reporting communicable disease.	408
FINES:	
refund of.	183
FIRE ESCAPES:	
required for hospital buildings.	233
FOREIGN CORPORATIONS:	
Empire State Finance Corporation must comply with provisions of banking law as to investment companies.	307
FOREIGN TRUST COMPANIES:	
sections 33-a, 33-b, 501, 186, 223; right of foreign trust companies to do business in New York State.	229
FOREST PRESERVE:	
control and disposal of lands within.	75
construction of highways within.	130
powers of conservation commission to grant permits.	124

502 INDEX TO OPINIONS, FORMAL AND INFORMAL

FOREST PRESERVE — Continued.	PAGE
tree cutting.	124
use of stone, sand and gravel, highway construction within forest preserve.	130
GENERAL BUSINESS LAW:	
section 71; requirements for granting license to private detective..	250
section 77; use of word "architect".....	295
section 32; peddler's license for veterans.....	368
article 7-a; right of practicing architect to add words "registered architect" without certificate from state board of regents.....	252
article 7; private detective must secure license to carry concealed weapon.	362
GENERAL CONSTRUCTION LAW:	
section 24; armistice day is legal holiday.....	377
GENERAL CORPORATION LAW:	
article I, section III; employees of Chautauqua Institution.....	86
section 7, 60-65 correction or change in corporate name.....	237
section 3; domestic business corporation negotiating securities.....	304
section 221, General Corporation Law; publication of certificate of dissolution of corporation.....	335
section 15, Banking Law; Empire State Finance Corporation must comply with provisions of banking law as to investment companies.	307
GENERAL MUNICIPAL LAW:	
section 91; courts and public officers governed by ordinances.....	427
section 51; regulation with respect to transcripts of records.....	186
section 51; publication of contents of probated will.....	400
GOVERNOR:	
prohibition against passes or franking privileges.....	427
section 6, Domestic Relations Law; marriage contracts.....	257
soldiers' bonus law.	431
HEADLIGHTS:	
sections 282-286, Highway Law; motor truck not to be registered without proof that it is equipped with lights.....	241
HEALTH OFFICER:	
appointment or election of.....	409
local health officer may regulate sale of milk within city limits....	334
section 25, Public Health Law; fees for reporting communicable disease.	408
HIGHWAYS:	
legislature has no power to modify specific provisions of a referendum act.	268
maintenance of.. . . .	262
power of Legislature to authorize construction.	130
HIGHWAY LAW:	
section 148, expense of conforming location of water-pipes.....	175
section 291; disposition of fees for issuance of chauffeurs and operators' licenses.	121
sections 282-286; motor truck not to be registered without proof that it is equipped with lights.....	241
sections 287-288; village ordinances regulating speed of motor vehicles cannot impose jail sentence.....	242
section 281; volunteer drivers of motor fire apparatus need not be licensed as chauffeurs.	296

HIGHWAY LAW — Continued.

PAGE

section 282; Secretary of State should not register motor vehicle to sealer of weights and measures unless said vehicle is controlled by municipality.	271
section 281; veteran not required to secure chauffeur's license when operating motor car while learning vocational trade.	244
section 207; care and maintenance of highway within municipality.	262
section 286; omnibus cars must be equipped with mirrors.	297
section 99; electors of village of Constableville qualified to vote for town superintendent of highways for funds for building bridges.	339
section 283-a, article 2; tax commission may employ agents to distribute automobile license in Brooklyn.	322
section 176; commissioners of State Reservation at Niagara not required to keep sidewalks free from snow and ice.	394

HOLIDAYS:

section 145; Negotiable Instruments Law; when instruments mature on Armistice Day.	378
--	-----

HOSPITALS:

section 334; Public Health Law; fire escapes.	233
Board of Supervisors, Erie County, may appropriate for a hospital.	306

IMMUNITY:

concurrent resolution of legislature granting immunity of witnesses.	424
hall of military records.	421

INDIAN LAW:

section 11, hunting and fishing on Indian Reservations.	83
---	----

INDIAN RESERVATIONS:

hunting and fishing on Indian Reservations.	83
---	----

INDIGENT PERSONS:

section 25, Poor Law; quarantine.	371
section 23, Poor Law; expense of quarantine.	404

INDUSTRIAL BANKING SYSTEM:

automatic tellers.	294
----------------------------	-----

INSANE:

commitment on Sunday.	292
residence of.	297
section 85, Insanity Law; costs of commitment.	384

INSURANCE:

application of insurance moneys paid for burned bridge.	357
---	-----

INSURANCE:

section 170, Insurance Law; guaranty by Credit Clearing House upon credit giving.	235
section 100; bonds of Great Northern and of The Northern Pacific Railway Companies as investments.	284
section 1868, Penal Law; public officer cannot act as insurance agent in making contract with municipality.	380

INTEREST:

school authorities have no power to issue bonds bearing greater rate of interest than specified in proposition voted upon.	276
--	-----

INVESTMENTS:	PAGE
bonds of city of Covington, Ky.....	285
railroad bonds as investments for savings banks.....	254
section 239, Banking Law; bonds of the cities of state of Missouri as investments for savings banks.....	271
section 239, Banking Law; legality of bonds of cities of West Virginia as investments for savings banks.....	273
section 238, Banking Law; common school warrants of state of Georgia are not legal investments for savings banks in New York State	280
section 100, Insurance Law; bonds of Great Northern and The Northern Pacific Railway Companies as investments.....	284
section 239, Banking Law; tax anticipation bonds of state of Arizona as legal investments for savings banks.....	288
section 239, Banking Law; bonds of North Dakota as legal investments for savings banks.....	301
section 239, Banking Law; notes issued by military college in South Carolina as investments for savings banks.....	302
JUDICIARY LAW:	
section 303; fees of stenographers.....	180
section 5; commitment of insane on Sunday.....	292
JUSTICE OF PEACE:	
section 56, Criminal Code; section 1897, Penal Law; no jurisdiction to try person over sixteen years of age for violation section 1897 of penal law.....	245
section 30, Public Officers Law; when vacancy created.....	283
KNIGHT ACT:	
Commissioner of Highways required to complete highway contracts terminated thereunder.....	268
LABOR LAW:	
section 3; application to laborers in service of Board of Education	61
LABORATORIES:	
right of Board of Supervisors to contract with state hospital for use of laboratory	375
section 25, Public Health Law; laboratory not entitled to fee for reports	337
LAWS:	
chapter 293, Laws 1913; appointment of subordinates of Erie County Commissioner of Charities.....	70
chapter 702, Laws 1921; preference to veterans.....	158
chapter 410, Laws 1921; construction of highways within forest preserve; spoil banks; sand and gravel.....	130
chapter 293, Laws of 1913; Erie County Commissioner of Charities and Correction	70
chapter 580, Laws of 1921; Motor Vehicle Law.....	121
chapter 321, Laws 1898; right of board of supervisors to appoint additional deputy sheriff, Oneida county.....	239
chapter 122, Laws 1919; persons entitled to World War Medal....	247
chapter 584, Laws 1920; payment of broker's fee for sale of Arsenal property not authorized.....	247
chapter 459, Laws 1919; chapter 18, Laws 1921; Legislature has no power to modify specific provisions of a Referendum Act.....	268
chapter 176, Laws 1921; maintenance of assistant superintendent of State charitable institution.....	310
chapter 715, Laws 1921; exemption of motion pictures from license..	353

LAWS — Continued.

PAGE

chapter 444, Laws 1921; exemption of new building from local taxation	355
chapter 907, Laws 1920; application of insurance moneys paid for burned bridge	357
chapter 20, Laws 1921; tax commission may employ agents to distribute automobile license in Brooklyn.....	322
chapter 90, Laws of 1921; authority of State Tax Commission to establish office in Brooklyn.....	319
chapter 696, Laws 1921; jurisdiction Suffolk County Board of Child Welfare	365
chapter 396, Laws 1921; direct tax for soldiers' bonus.....	431
chapter 744, Laws 1865; military records.....	421
chapter 768, Laws 1917; retirement of Civil War veterans.....	398
chapter 912, Laws 1920; tax on boxing exhibitions.....	229

LEGAL HOLIDAY:

section 24, General Construction Law; Armistice Day.....	377
--	-----

LEGISLATIVE BILL DRAFTING COMMISSION:

article 12, section 2; article 3, section 18; State Constitution; naming a particular city in proposed act to amend Election Law.....	263
---	-----

LEGISLATURE:

appropriation by, for refund of fine.....	183
concurrent resolution granting immunity of witnesses.....	424
members may hold town offices.....	383
power to modify specific provisions of a referendum act.....	296
power of to authorize construction of highways in forest preserve..	130
right to regulate cutting trees on privately owned lands.....	110

LIBERTY BONDS:

depreciation of, court and trust funds.....	215
---	-----

LICENSES:

exemption of motion pictures from.....	353
fees for registering motor vehicles of Sealer of Weights and Measures	271
fees for registering motor vehicles for Sealer of Weights and Measures	271
non-resident fishing licenses.....	219
peddlers license to veterans.....	368
section 3, Boxing Law; license required for training exhibitions in gymnasiums	250

LIMITATION OF INDEBTEDNESS:

village not limited in providing for water supply.....	361
--	-----

MAINTENANCE:

must be considered in computing retirement pension.....	299
---	-----

MAINTENANCE OF HIGHWAY:

sections 207, highway law.....	262
--------------------------------	-----

MARITIME WORKERS:

application of Workmen's Compensation Law.....	436
--	-----

MARRIAGE:

section 6, Domestic Relations Law; marriage contracts.....	257
sections 11, 12, 225, Domestic Relations Law; non-resident clergymen solemnizing marriage within this State.....	259
transcripts of marriage records.....	187

506 INDEX TO OPINIONS, FORMAL AND INFORMAL

MEDICAL INSPECTORS:	PAGE
section 570, Education Law; compensation of school physician.....	333
MEMORANDA:	
prohibition against passes to public officers.....	427
regulating courts and public officers.....	427
soldiers' bonus	431
Workmen's Compensation Law; maritime workers.....	436
MERGER:	
use of more than one name by corporation.....	366
MILITARY LAW:	
section 19-a; retirement of Civil War veterans.....	260
MILITARY RECORDS:	
memorandum affecting Hall of Military Records.....	421
MIRRORS ON TRUCKS:	
section 286, General Highway Law; omnibuses must be equipped with mirror	297
MORTGAGES:	
right of savings banks to buy from trustees.....	370
MOTION PICTURE COMMISSION:	
chapter 715, Laws 1921; exemption from license.....	353
chapter 715, Laws 1921; fees for licenses for motion picture films....	321
MOTION PICTURES:	
city of Rome may not vote upon showing moving pictures on the first day of the week.....	363
MOTOR VEHICLE LAW:	
section 291; disposition of fees for issuance of chauffeurs' and operators' licenses	121
section 286; motor truck not to be registered without proof that it is equipped with lights.....	241
section 287, Highway Law; village ordinances regulating speed of motor vehicles cannot impose jail sentence.....	242
section 281, Highway Law; veteran not required to secure chauffeur's license when operating motor car while learning vocational trade..	244
section 281, General Highway Law; volunteer drivers of motor fire apparatus need not be licensed as chauffeurs.....	296
section 286, General Highway Law; omnibuses must be equipped with mirror	297
section 282; Secretary of State should not register motor vehicle to sealer of weights and measures unless said vehicles are controlled by municipality	271
NAVIGABLE WATERS:	
owner of upland on navigable water may construct wharfs and use waters for boating and fishing.....	282
right to cut ice.....	418
NEGOTIABLE INSTRUMENTS:	
section 145, Negotiable Instruments Law; payments of, when due on Armistice Day	378
NOTARIES PUBLIC:	
validating acts upon payment of fees.....	255

NUISANCES:	PAGE
right of local authorities to abate.....	333
PENAL LAW:	
section 1897; justice of peace has no jurisdiction to try person over sixteen years of age for violation section 1897 of Penal Law.....	245
section 1897; private detectives require license to carry concealed weapon	362
section 1142-a; distribution of advertising matter to medical profession	382
section 1866; public officer cannot act as insurance agent in making contract with municipality.....	380
PENSION:	
section 21-a, Civil Service Law; method of computing.....	299
PERMITS:	
power of Conservation Commission to grant permits for use of streams, etc., in forest preserve.....	124
superintendent of public works may issue revocable permits for use of canal lands.....	273
PETITION:	
not necessary to establish water supply district.....	340
POLICEMEN:	
section 90, Village Law; village board to employ policemen.....	305
POLICE POWER:	
regulating tree cutting upon privately owned lands.....	110
POOR LAW:	
section 25; expense of quarantine.....	371
section 23; expense of quarantine indigent persons.....	404
PORT AUTHORITY:	
lease of office quarters and audit of expenditures.....	289
PRIVATE DETECTIVES:	
license required to carry concealed weapon.....	362
section 71, General Business Law; granting of license by Comptroller	250
PROMOTIONS:	
suspended list of civil service employees.....	149
PROPERTY RIGHTS:	
section 10, Real Property Law; alien residents of State may purchase and hold property.....	402
PUBLIC BUILDINGS LAW:	
section 3; lease of office for port authority.....	289
PUBLIC DUMP:	
section 23, Village Law; village has no power to purchase lands outside corporate limits for public dumping grounds.....	282
PUBLIC HEALTH LAW:	
section 21; appointment or election local health officers.....	409
section 25; fees allowed local health officer for reporting communicable disease.	408
section 370; regulations of Public Health Council.....	186

PUBLIC HEALTH LAW—Continued.		PAGE
section 391; furnishing transcripts of records of division of vital statistics		186
section 334; fire escapes for hospital buildings.....		233
section 378; duties of coroners.....		312
section 2-b; regulations for keeping cows and selling milk within city limits.		334
section 25, Public Health Law; laboratory not entitled to fee for reports		337
PUBLIC LANDS LAW:		
section 50; sale of abandoned canal lands.....		75
section 8; hunting and fishing on Indian reservations.....		83
sections 102-3; Commissioners of State Reservation at Niagara, not required to keep sidewalks free from snow and ice.....		394
PUBLIC OFFICERS:		
members of State Legislature not prohibited from holding town office	383	
office of clerk of school board and supervisor not incompatible.....	384	
only resident electors of towns may hold office.....	283	
prohibition against passes or franking privileges.....	427	
sheriff appointed to fill vacancy may not succeed himself.....	398	
sheriff appointed to fill vacancy ineligible for election for succeeding term	387	
PUBLIC OFFICERS:		
section 1868, Penal Law; public officer cannot act as insurance agent in making contract with municipality.....	380	
PUBLIC OFFICERS LAW:		
section 30; only resident electors of towns entitled to hold office....	283	
section 11; premium on bond of school collector.....	348	
section 66; publication of contents of probated will.....	400	
PUBLIC RECORDS:		
publication of probated will cannot be enjoined.....	400	
PUBLIC SERVICE COMMISSIONS LAW:		
section 71; payment of counsel fees from village funds.....	249	
QUARANTINE:		
section 23, Poor Law; expense of quarantine of indigents.....	404	
section 25, Poor Law; expense of.....	371	
RECORDS:		
authority of city, town or county clerk to make regulations with respect to issuing transcripts of records.....	186	
REFERENDUM:		
legislature has no power to modify Referendum Act.....	268	
section 270, charter of city of Jamestown, majority vote is final....	290	
use of.	363	
REINSTATEMENTS:		
from suspended lists of employees.....	149	
RESIDENT OF STATE:		
fishing license to.	219	
REST ROOMS:		
town not authorized to tax for establishment of.....	363	

RETIREMENT:	PAGE
method of computing pensions.	299
of Civil War Veterans.	260
SALARIES OF LABORERS IN SERVICE OF A BOARD OF EDUCATION:	
application of Labor Law to.	61
SALE OF PROPERTY FOR UNPAID TAXES:	
section 82-86, Tax Law; expense of sale of property for unpaid taxes.	314
SANITARY CODE:	
local health officers may regulate sale of milk within city limits.	334
SAVINGS BANKS:	
formation of.	286
right to buy mortgage from trustee.	370
SAVINGS BANKS INVESTMENTS:	
bonds of College of South Carolina.	302
bonds of North Dakota.	301
section 239, Banking Law; railroad bonds as investments.	254
tax anticipation bonds of Arizona.	288
SCHOOL BONDS:	
rate of interest upon.	275
SCHOOL DISTRICTS:	
method of distribution of corporation tax.	356
SECRETARY OF STATE:	
section 281, General Highway Law; veterans not required to secure chauffeur's license when operating motor car while learning a vocation trade.	244
section 282-286, General Highway Law; motor truck not to be registered without proof that it is equipped with lights.	241
section 282; Secretary of State should not register motor vehicle to sealer of weights and measures unless said vehicles are controlled by municipality.	271
SHERIFF:	
appointment of deputy sheriff.	239
when appointed to fill vacancy is ineligible for election for succeeding term.	387
section 1, article 10; State Constitution; sheriff appointed to fill vacancy may not succeed himself.	398
section 1, article 10; State Constitution; eligibility of under sheriff for election to office of sheriff.	388
SNOW AND ICE:	
removal of.	394
SPECIAL COUNTY JUDGE OR SURROGATE:	
right to grant order of adoption.	352
STATE ATHLETIC COMMISSION:	
section 3, State Boxing Law; license required for training exhibitions in gymnasiums.	250
State will not sue upon boxing club bond to recover debt due boxer.	381

STATE ARCHITECT:	PAGE
article 7-a, General Business Law; right to practice without certificate from Board of Regents.	252
section 35, State Finance Law; bids may not exceed amount appropriated.	401
STATE BOARD OF ARMY COMMISSIONERS:	
chapter 584, Laws 1920; broker's fee not authorized for sale of State Arsenal property.	247
STATE BOARD OF CHARITIES:	
section 12, County Law; Board of Supervisors Erie County may appropriate for a hospital.	306
jurisdiction of Suffolk County Board of Child Welfare.	365
STATE CHARITIES LAW:	
section 45, State Charities Law; maintenance of assistant superintendent of State charitable institution.	310
STATE CIVIL SERVICE COMMISSION:	
section 22-a, Civil Service Law; rule XVI.	149
section 22-a, Civil Service Law; rule XVI; suspended lists of persons whose positions have been abolished.	149
section 21-b, Civil Service Law; preference to veterans.	158
termination of world war.	389
STATE COMMISSIONER OF HEALTH:	
fees for transcripts of records.	186
Public Health Law; section 391.	186
rules of public health council.	186
transcripts of records of births, marriages and deaths.	186
vital statistics.	186
STATE COMPTROLLER:	
article VII, State Constitution; all bonds issued by State Comptroller subsequent to January 1, 1921, must be serial bonds.	276
court and trust funds.	215
court and trust funds, loss through depreciation.	215
investment of funds deposited with county treasurer.	215
section 71, General Business Law; private detective license.	250
section 3, Finance Law; lease of office for port authority.	289
section 3, Finance Law; power of comptroller to audit claims incurred by Port Authority.	289
transfer of securities.	215
STATE CONSTITUTION:	
article VIII, section 10; city water bonds.	392
article VII, sections 7 and 8; State land within forest preserve.	75
article VII, section 4; issuance of funds by State Comptroller.	276
article III, section 21; payment of money out of State Treasury.	183
article V, section 9; preference to veterans, Civil Service Law.	158
article III, section 14; article VII, section 1; amendment of special corporate charters without legislative action.	232
article VIII, section 28; authority of State Tax Commission to establish office in Brooklyn.	319
article III, section 7; member of State legislature need not resign in order to be candidate for elective city office.	327
article 12, section 2; naming of city in bill to amend Election Laws.	263
article X, section 2; appointment of local health officer.	409
section V, article III; passes or franking privilege to public officers.	427
section 1, article X; sheriff appointed to fill vacancy may not succeed himself.	398

STATE CONSTITUTION — Continued.	PAGE
section 1, article X; eligibility of under sheriff for election to office of sheriff.	388
section 1, article 10; person appointed by governor to fill vacancy in office of sheriff ineligible for election for succeeding term.	387
STATE DEPARTMENT OF HEALTH:	
section 25, Public Health Law; laboratory not entitled to fee for reports.	337
appointment or election of local health officers.	409
section 25, Poor Law; expense of quarantine, indigent person.	371
STATE EDUCATION DEPARTMENT:	
section 219-h, Tax Law; method of distribution of corporation tax.	356
STATE FINANCE LAW:	
investment of Court and Trust funds.	215
section 35; bids may not exceed amount appropriated.	401
section 3; lease of office quarters for Port Authority.	289
section 50; authority of State Tax Commission to establish office in Brooklyn.	319
STATE FISCAL SUPERVISOR:	
method of computing pension.	299
section 45, State Charities Law; maintenance of assistant superintendent of State Charitable Institution.	310
STATE HIGHWAY COMMISSION:	
construction of highways within forest preserve.	130
section 226, Village Law; section 148, Highway Law; duty of relocating water-pipes in public highway.	175
section 6, Referendum Act; legislature has no power to modify the specific provisions of a referendum act.	268
spoil banks.	130
STATE INDUSTRIAL COMMISSION:	
salaries of laborers in employ of a board of education.	61
STATE HOSPITAL COMMISSION:	
contract of Board of Supervisors, St. Lawrence State Hospital for use of State Laboratory.	375
residence of insane person.	297
section 5, Judicial Law; commitment of insane on Sunday.	292
section 85, Insanity Law; costs of commitment of alleged insane.	384
STATE POLICE:	
section 286, General Highway Law; omnibuses must be equipped with mirror.	297
STATE RESERVATION AT NIAGARA:	
section 102, Public Lands Law; commissioners not required to keep sidewalks free from snow and ice.	394
STATE SUPERINTENDENT OF BANKS:	
bonds of city of Covington, Kentucky, as legal investments for savings banks.	285
section 239, Banking Law; bonds of the cities of state of Missouri as investments for savings banks.	271
section 239, Banking Law; legality of bonds of cities of West Virginia as investments for savings banks.	273

STATE SUPERINTENDENT OF BANKS—Continued.		PAGE
section 238, Banking Law; common school warrants of state of Georgia are not legal investments for savings banks in New York State.		280
section 239, Banking Law; tax anticipation bonds of State of Arizona as legal investments for savings banks.		288
section 230, Banking Law; notice of intention to form savings banks corporation.		286
section 239, Banking Law; bonds of North Dakota as legal investments for savings banks.		301
section 239, Banking Law; notes issued by military college in South Carolina as investments for savings banks.		302
section 293, Banking Law; Empire State Finance Corporation must comply with provisions of Banking Law as to investment companies.		307
section 145, Negotiable Instruments Law; negotiable instruments payable on Armistice Day.		378
STATE SUPERINTENDENT OF INSURANCE:		
section 100, Insurance Law; bonds of Great Northern and of The Northern Pacific Railway Companies as investments.		284
deposits of aliens companies held by insurance department.		417
STATE SUPERINTENDENT OF PUBLIC BUILDINGS:		
probationary appointments		64
retention of veterans.		64
STATE SUPERINTENDENT OF PUBLIC WORKS:		
application of insurance moneys for burned bridge.		357
Canadian canal boats or tugs may not carry cargo from one point to another on State Barge Canal.		264
maintenance of bridge, Cayuga Lake inlet, Ithaca.		341
power to issue revocable permit for use of canal lands.		273
STATE TAX COMMISSION:		
delegation of authority.		165
fees for registration of motor vehicles.		121
section 291, Highway Law; disposition of fees collected for issuance of chauffeur's license.		121
sections 229, 234, Tax Law; payment of stenographer's fees.		180
sections 170, 170-a, 170-b, 171, 171-a, Tax Law; power of Deputy Tax Commissioner		165
section 218, 198, Tax Law; refund of taxes and credits upon corporate franchise tax		239
section 170-a, Tax Law; authority of State Tax Commission to establish office in Brooklyn.		319
sections 170-a, 170-b, Tax Law; Tax Commission may employ agents to distribute automobile license in Brooklyn.		322
STATE TREASURER:		
refunding fines for violation of Conservation Law.		183
section 25, State Boxing Law; tax on proceeds from boxing exhibitions		229
section 52, Executive Law; Deputy State Treasurer may sign checks for disbursements from State Teachers' Retirement Fund.		234
STENOGRAPHERS:		
fees to employees of State Tax Commission.		180
STOCK CORPORATION LAW:		
section 18; right of corporations to amend special corporate charter.		232
section 15; use of more than one name in case of merger.		366

STOCK CORPORATION LAW — Continued.

PAGE

section 52; domestic business corporations negotiating securities.....	304
section 5; Empire State Finance Corporation must comply with provisions of Banking Law as to investment companies.....	307

SUPERVISORS:

authority to authorize appointments of deputy sheriff.....	239
authorization of, for appointment of subordinates by Commissioner of Charities, Erie County.....	70
member may hold office of clerk of school board.....	384
right to contract for use of State laboratories.....	375
section 162, County Law; supervisor may not hold office of deputy county clerk	396

SURROGATE:

right of special surrogate to grant order of adoption.....	352
--	-----

SUSPENDED LISTS:

appointments and reinstatements.....	149
--------------------------------------	-----

TAXATION:

direct State tax for soldiers' bonus.....	431
proceeds of boxing exhibitions.....	229
exemptions on church property.....	256
exemption of realty for three years.....	355

TAX LAW:

section 4-b; exemptions of realty for three years.....	355
sections 229, 234; payment to stenographers of State Tax Commission for minutes of hearings.....	180
sections 170, 170-a, 170-b, 171, 171-a, Tax Law; delegation of authority to Deputy Tax Commissioner.....	165
sections 218, 198; refund of taxes and credits upon corporate franchise tax	239
section 7; church property exempt from taxation.....	256
section 219-h; method of distribution of corporation tax.....	356
section 82-88; expense of sale of property for unpaid taxes.....	314
section 170-a; authority of State Tax Commission to establish office in Brooklyn	319
sections 170-a, 170-b, Tax Commission may employ agents to distribute automobile license in Brooklyn.....	322
sections 16, 17; tax exemption of reforested land.....	328
section 570, 571; compensation of school physician.....	333
tax on proceeds from boxing exhibitions.....	229

TAX OFFICERS LAW:

section 66; transcripts of records.....	186
vital statistics.....	186

TOWN BOARD:

power of to exempt from tax.....	355
section 131, Town Law; two meetings to be held annually.....	383

TOWN LAW:

office of clerk of school board and supervisor not incompatible.....	384
section 131; two town meetings to be held annually.....	383
section 472; town board has no right to enact ordinance zoning town.....	379
section 81; only resident electors of town entitled to hold office.....	383
section 53; only electors are qualified to vote at town meetings.....	364
towns not authorized to tax for public rest rooms.....	363

TOWN SUPERINTENDENT OF HIGHWAYS:	PAGE
section 99, Highway Law; voting for town superintendent of highways for funds for building bridges.....	339
TRAINING EXHIBITIONS:	
license required when admission fee is charged.....	250
TRANSPORTATION CORPORATIONS LAW:	
section 81; establishment of water supply district.....	340
TRUST COMPANIES:	
right of foreign companies to do business in New York State.....	229
TRUSTEE:	
of public library may hold village office.....	278
UNITED STATES PUBLIC HEALTH SERVICE:	
section 1142-2, Penal Law; distribution of advertising matter to medical profession.	382
UPLANDS:	
owner of upland on navigable water may construct wharfs and use waters for boating and fishing.....	282
VACANCY:	
section 30, Public Officers Law; when vacancy created.....	283
VALIDATING ACTS:	
of notary public.	255
VETERANS:	
chapter 122, Laws 1919; persons entitled to World War Medals....	247
issue of peddler's license to.....	368
recording certificate of honorably discharged.....	368
retention of, in the State service.....	64
section 21-b, Civil Service Law; preference to.....	367
section 21-a, Civil Service Law; retirement of.....	398
section 21-b, Civil Service Law; preference to.....	158
section 19-a retirement of Civil War Veterans.....	260
section 21-a; computing pension.....	299
taxation for soldiers' bonus.	431
VILLAGE BONDS:	
change of date of issue or maturity.....	279
VILLAGE LAW:	
power of village authorities to change date of issue or maturity of village bonds	279
section 90; ordinance regulating keeping of calves.....	270
section 42; volunteer firemen may hold village office.....	278
section 42; trustee of public library may hold village office.....	278
section 89; village has no power to purchase lands outside corporate limits for public dumping grounds.....	282
sections 90, 188-a, 190; authority of village board to employ policemen	305
section 130; limit of indebtedness for water supply.....	361
section 222; village cannot be compelled to furnish water.....	404
section 226; expense of conforming location of water pipes.....	175
VILLAGES:	
authority of village board to pay counsel fees in contest before public service commission	249

VITAL STATISTICS:	PAGE
article 26; rules and regulations relative to transcripts of records....	186
VOLUNTEER FIREMEN:	
section 42, Village Law; volunteer firemen may hold village office..	278
WATER BONDS:	
limitation and retirement.....	392
WATER SUPPLY DISTRICT:	
petition not necessary to establish.....	340
section 222, Village Law; village cannot be compelled to furnish water	404
WATER SYSTEM:	
moneys expended for.....	404
WATERWAYS:	
right to cut ice.....	418
WILLS:	
publication of probated will cannot be enjoined.....	400
WITNESSES:	
concurrent resolution of Legislature granting immunity.....	424
WORLD WAR:	
chapter 122, Laws 1919; persons entitled to medal.....	247
termination of	389
WORKMEN'S COMPENSATION LAW:	
article 1, section 2; employees of Chautauqua Institution.....	86
employees of Chautauqua Institution.....	86
maritime workers	436

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